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No. 00 - ____

IN THE

# Supreme Court of the United States

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MEMORIAL HOSPITALS ASSOCIATION,
*Petitioner*,

v.

CAROLYN HUMPHREY,
*Respondent*.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The Americans with Disabilities Act ("ADA") prohibits covered employers from "discriminating" in the terms and conditions of employment, and defines "discrimination" to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or an employee." 42 U.S.C. § 12112(b)(5)(A).

The questions presented in this petition are:

1. Whether, as the Ninth Circuit held below, an employer must offer a "reasonable accommodation" to an employee before terminating her employment even when the employee knows about and previously has rejected that reasonable accommodation, or, as other courts of appeals have held, an employer need not offer a reasonable accommodation to an employee when the employee knows about the "reasonable accommodation" and already has rejected it.

2. Whether, as the Ninth Circuit held below, an indefinite leave of absence that might "plausibly" allow an employee to return to work qualifies as a "reasonable accommodation," or as other courts of appeals have held, a leave of absence must be definite in duration and "likely" to enable the employee to return to work to qualify as a "reasonable accommodation."

## CORPORATE DISCLOSURE STATEMENT

Petitioner Memorial Hospitals Association is a California nonprofit public benefit corporation with Sutter Health as its sole corporate member. Neither Memorial Hospitals Association nor Sutter Health has any affiliates, parents, or subsidiaries with publicly issued shares.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Memorial Hospitals Association ("MHA") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in this case is reported at 239 F.3d 1128 (9th Cir. 2001) and is reprinted in the Appendix to this Petition ("App.") at App. 1a. The opinion of the United States District Court for the Eastern District of California (Coyle, J.) is unreported and is reprinted at App. 25a.

## JURISDICTION

The opinion of the Court of Appeals was issued on February 13, 2001. On April 30, 2001, Justice O'Connor granted petitioner an extension until June 13, 2001, to file this petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The Americans with Disabilities Act ("ADA" or "Act") is codified at 42 U.S.C. § 12101 *et seq.*, and pertinent provisions are reprinted at App. 48a.

## STATEMENT OF THE CASE

The ADA prohibits covered employers from "discriminating" in the terms of employment against a "qualified individual with a disability," 42 U.S.C. § 12112(a), *i.e.*, "an individual with a disability who, with or without *reasonable accommodation*, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8) (emphasis

added). The ADA defines "discrimination" to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability . . . , unless [the employer] can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such [employer]." 42 U.S.C. § 12112(b)(5)(A). While the ADA does not explicitly define "reasonable accommodation," the Act lists examples of accommodations that, in appropriate circumstances, might be reasonable. 42 U.S.C. § 12111(9).

The regulations promulgated by the Equal Employment Opportunity Commission ("EEOC") in implementing the ADA state that in determining reasonable accommodations, an employer "may" be required to engage in an "interactive process" with employees. 29 C.F.R. § 1630.2(o)(3). In the Appendix to the regulations (entitled "Interpretive Guidance on Reasonable Accommodation"), the EEOC provides further explanation about this interactive process, stating that "the appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability." 29 C.F.R. Pt. 1630, App. § 1630.9. The Appendix also provides additional examples of accommodations that might be reasonable, including a suggestion that the type of accommodation at issue in this case – a leave of absence – might be reasonable. 29 C.F.R. Pt. 1630, App. § 1630.2(o).

This case presents two important questions regarding the ADA's "reasonable accommodation" requirement. The first question is whether an employer must offer an employee an accommodation that is known to the employee and that she previously has rejected. The Ninth Circuit concluded that the employer must offer the accommodation, whereas the Sixth Circuit holds that it need not.

The second question is whether an indefinite leave of absence that might "plausibly" allow an employee to return to work qualifies as a "reasonable accommodation." The Ninth Circuit held that an indefinite leave of absence constitutes a reasonable accommodation so long as it could "plausibly" enable the employee to perform her job upon return from leave. The Ninth Circuit expressly rejected the higher standard of "likely." This holding conflicts with the courts of appeals in two ways. First, numerous courts of appeals hold that a leave of absence that is indefinite in duration can never be a reasonable accommodation. Second, the Eleventh Circuit holds that a leave of absence can serve as a reasonable accommodation only if it is "likely" to enable the employee to perform her job adequately.

**A. Factual Background.**

Respondent Carolyn Humphrey ("Humphrey") began working for MHA as a medical transcriptionist in 1986. App. 2a. In 1989, Humphrey began having significant problems with her attendance, frequently not showing up to work either on time or at all. *Id.* She contends that she engaged in a series of obsessive rituals that impeded her ability to get to work. *Id.* For instance, she repeatedly rinsed her hair for up to an hour, and if it did not "feel right," she would return to the shower to wash it again. *Id.* The entire process of washing her hair could take up to three hours. *Id.* She also felt compelled to dress very slowly, to check and recheck repeatedly for papers she needed, and to pull out strands of her hair because she felt as though something was crawling on her scalp. Humphrey contends that these acts made coming to work on time very difficult. *Id.* On the occasions that she realized that she was late, she would panic, which made it even more difficult for her to leave her house and get to work. *Id.*

As a result of Humphrey's repeated tardiness and absences, in June 1994, MHA gave her a "Level I"

disciplinary warning under its attendance and discipline policy. App. 2a. This warning required that Humphrey call her supervisor before the beginning of her scheduled shift if she was going to be late or absent. *Id.* Humphrey's attendance problems did not improve after this warning; in fact, they grew worse. *Id.* She also failed to follow the call-in policy required under her disciplinary warning. *Id.* Consequently, in December 1994, she received a "Level III" warning, which was based on four tardy days and one unreported absence over a two-week period. *Id.*

After receiving her Level III warning, Humphrey took advantage of MHA's Employee Assistance Program ("EAP"). App. 3a. Through EAP, Humphrey was counseled regarding her attendance, and she received hints to help her improve her attendance record, such as getting up earlier and laying out her clothes the night before. *Id.* Although Humphrey attended several sessions of counseling through EAP and found this program helpful, her efforts to follow the hints ultimately were not successful. *Id.*

In 1995, after watching an episode of the Oprah Winfrey Show focusing on Attention Deficit Disorder, Humphrey began to suspect that her inability to show up to work on time may have been related to a medical condition. App. 3a. Accordingly, on May 3, 1995, she met with MHA's Employee Health Nurse Practitioner, Elizabeth Pierson, to discuss her suspicions. App. 3a, 26a. At MHA's expense, Pierson referred Humphrey to a diagnostic evaluation and psychological testing with a local physician, Dr. John Jacisin. App. 3a.

On May 12, 1995, Dr. Jacisin examined Humphrey and diagnosed her as suffering from obsessive-compulsive disorder. App. 3a. He advised Pierson of his diagnosis in a May 18, 1995 letter, in which he also opined:

> I believe that we can treat this, although, the treatment may take a while. I do believe that she

> would qualify under the Americans with Disability Act, although, I would like to see her continue to work, but if it is proving to be a major personnel problem, she may have to take some time off until we can get the symptoms better under control.

App. 4a. This letter was the only evidence that Humphrey submitted to her employer about the need for a leave of absence.

On June 7, 1995, Humphrey met with her supervisor and Pierson to discuss Dr. Jacisin's letter and potential courses of action. App. 4a. MHA offered Humphrey "some time off," but Humphrey indicated that she wanted to continue working. App. 27a. Accordingly, MHA offered her another accommodation – a flexible start-time arrangement, under which Humphrey could begin work anytime within a 24-hour period on days on which she was scheduled to work. App. 5a. Once she arrived to work, however, Humphrey would be required to complete her 8-hour scheduled shift. App. 28a. MHA advised her that if she was not planning to arrive at work at all on a scheduled day, she should contact someone in her supervisory chain within the medical transcription department. *Id.* Pierson asked Humphrey to think about whether any other accommodation requests were desirable, and to submit any future accommodation requests in writing. App. 5a. A few days later, Humphrey accepted the flexible start-time arrangement in writing and further agreed that she would "still do [her] best to be at [her] work station at the earliest possible hour." *Id.*

Despite the flexible start-time arrangement, Humphrey continually failed either to report for work or to inform her supervisor that she would be unable to report to work. App. 5a, 28a. Each of Humphrey's unscheduled absences caused MHA to lose a complete 24-hour period of productivity because the medical transcription department did not know until the 24-hour period expired that Humphrey would not

report for work that day. App. 28a. MHA's lack of knowledge about Humphrey's absences before they occurred also resulted in several missed deadlines in the medical transcription department. *Id.*

Because the flexible start-time arrangement did not eliminate her attendance problems, Humphrey thereafter asked MHA if she could work at home. App. 5a, 28a. MHA denied this request, citing its uniformly-applied departmental policy that prohibited any employee subjected to disciplinary action from working at home. App. 6a, 28a.

At her September 26, 1995 performance review, Humphrey was told that she had been absent an "unacceptable" nine times within the previous two months without calling in. App. 29a. Following this performance review, Humphrey was absent twice more. *Id.* On October 10, 1995, Humphrey was terminated. App. 8a, 29a. Humphrey testified that on the day she learned of her termination, she asked MHA for a leave of absence. App. 8a. MHA denied that Humphrey ever asked for a leave of absence on the day of her termination, and no finding of fact has been made on this issue. *Id.*

**B. District Court Proceedings.**

On September 6, 1996, Humphrey filed suit against MHA in the United States District Court for the Eastern District of California. App. 8a. Humphrey alleged, *inter alia*, that MHA violated the ADA and its state law counterpart by failing to provide her reasonable accommodations that would enable her to perform the essential functions of the medical transcriptionist position. App. 8a.[1] Specifically, Humphrey complained that she

[1] Humphrey also alleged claims under the Family Medical Leave Act and California Family Rights Act. The district court granted MHA's summary judgment on these claims, and because Humphrey did not appeal that ruling, these claims are not at issue here. App. 8a, n.5.

should have been offered two separate accommodations for her disability – the right to work at home and a leave of absence. App. 31a.

The district court granted summary judgment in favor of MHA. App. 8a. The court held that Humphrey's ADA claim focused on two issues: "(1) whether a prolonged medical leave of absence or permission to work at home are appropriate 'reasonable accommodations' for an illness which causes an ADA plaintiff to sporadically miss work; and (2) if so, whether [Humphrey] introduced sufficient evidence to create a genuine dispute of material fact as to whether [MHA], by not giving plaintiff a leave of absence before termination and by not allowing her to work at home, did not sufficiently engage in the interactive process that the ADA contemplates." App. 31a-32a.

The district court rejected Humphrey's claim that she should have been allowed to work at home,. App. 34a-35a. As for Humphrey's leave of absence argument, MHA contended that the leave requested by Humphrey here was unreasonable as a matter of law because it was indefinite in duration. Rather than decide this question, the district court examined a related issue that it deemed determinative: "whether [MHA] sufficiently engaged in the contemplated interactive process with regard to the medical leave of absence." App. 35a. Discussing several federal appellate decisions and quoting extensively from *Hankins v. The Gap, Inc.*, 84 F.3d 797, 801-02 (6th Cir. 1996) (App. 35a-45a), the court granted summary judgment for MHA because Humphrey "was initially offered a leave of absence and rejected it, and then failed to request a leave of absence subsequently," so the court "must place the blame for the breakdown in the interactive process with [Humphrey]." App. 45a.

**C. The Ninth Circuit's Decision.**

Humphrey appealed the district court's decision to the Ninth Circuit. In her appeal, Humphrey did not challenge the district court's holding that a right to work at home was not a reasonable accommodation. App. 21a n.16. Accordingly, the only issues on appeal were (1) whether a leave of absence was a reasonable accommodation and (2) whether MHA failed to engage in the interactive process.

The Ninth Circuit reversed the judgment of the district court. App. 24a. In an opinion by Judge Reinhardt, the court made two pertinent holdings. First, it held that a leave of absence was a reasonable accommodation as a matter of law because it could have "plausibly" enabled Humphrey to perform her job adequately. App. 21a-22a. Second, the Ninth Circuit held – again, as a matter of law – that MHA violated the ADA because it did not offer Humphrey a leave of absence. App. 18a-21a.

1. After observing that Humphrey could show she was a "qualified individual with a disability" under the ADA "so long as she is able to perform the essential functions of her job 'with or without reasonable accommodation,'" the Ninth Circuit looked to the EEOC regulations to conclude that a "leave of absence for medical treatment may be a reasonable accommodation under the ADA." App. 14a. The court also noted that "[w]e have held that where a leave of absence would reasonably accommodate an employee's disability and permit him, upon his return, to perform the essential functions of the job, that employee is otherwise qualified under the ADA." *Id.* (citations omitted).

MHA relied on *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1985), for the proposition that any leave of absence could not be a reasonable accommodation because there was no evidence concerning the leave's duration. The Ninth Circuit did not address *Myers*, noting only that "the ADA does not require an employee to show that a leave of absence is

certain or even likely to be successful to prove that it is a reasonable accommodation." App. 14a-15a. According to Judge Reinhardt, although Dr. Jacisin's letter – the only evidence pertaining to a leave of absence – never specified how long her impairment would last, the length of leave necessary to treat her impairment, or whether such a leave would be effective in allowing her to return to work, the letter nonetheless was "sufficient to satisfy the minimal requirement that a leave of absence could plausibly have enabled Humphrey adequately to perform her job." App. 15a-16a. Thus, without requiring any proof as to the necessary length of leave, the panel held that MHA violated the ADA as a matter of law by failing to offer a leave of absence before terminating Humphrey's position. *Id.* Judge Reinhardt did not cite ADA case law for the "plausibly have enabled" test. Rather, he relied on *Kimbro v. Atlantic Richfield Corp.*, 889 F.2d 869 (9th Cir. 1989), a case interpreting the State of Washington's civil rights law. App. 15a.

After concluding that a leave of absence "was a reasonable accommodation for Humphrey's disability" because it could "plausibly" enable her to function at work (App. 21a-22a), the Ninth Circuit also held that because MHA had a policy of giving six-month leaves of absence to disabled employees, it had "conceded that granting a leave of absence would not have posed an undue hardship." App. 22a. The court thus held "as a matter of law . . . that MHA violated the ADA's reasonable accommodation requirement." *Id.*

2. Judge Reinhardt then addressed the district court's conclusion that Humphrey could not prevail under the Act because she earlier had refused to accept a leave of absence as a reasonable accommodation. App. 18a-22a. In the Ninth Circuit's view, the pertinent legal question was as follows: "was MHA obligated to suggest a leave of absence or to

explore other alternatives in response to Humphrey's request for a work-at-home position, or was it Humphrey's burden to make an express request for a leave of absence before she was terminated?" App. 18a.

In answering this question, the Ninth Circuit reviewed the EEOC's regulations and Enforcement Guidance on Reasonable Accommodation, as well as its own precedent. Summarizing its decision in *Barnett v. U.S. Air*, 228 F.3d 1105 (9th Cir. 2000), *cert. granted*, 121 S. Ct. 1600 (Apr. 16, 2001), the Ninth Circuit held that "[o]nce an employer becomes aware of the need for accommodation, that employer has a mandatory obligation under the ADA to engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations." App. 18a. While the court suggested that the interactive process requires communication by both employers and employees, and that "neither side can delay or obstruct the process," App. 19a, the court also observed that "[e]mployers, who fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible." *Id.*

The Ninth Circuit also characterized the duty to accommodate as a "continuing duty" that is "not exhausted by one effort." *Id.* Moreover, citing the Enforcement Guidance, Judge Reinhardt noted that the employer's obligation to provide a reasonable accommodation "extends beyond the first attempt at accommodation and continues when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed." *Id.* Based on this rule, the Ninth Circuit concluded that Dr. Jacisin's short letter diagnosing Humphrey with OCD alerted MHA "to the possibility that any initial arrangement that kept Humphrey on the job might not be effective and that a leave

of absence might ultimately be necessary to accommodate her disability." App. 20a.

The court acknowledged that Humphrey never requested a leave of absence prior to her termination. App. 8a. The panel also specifically assumed that MHA previously had offered her a leave of absence, and that she had rejected it. App. 4a, 20a. In the court's view, however, that earlier offer of a leave of absence – and Humphrey's rejection of it – did not absolve MHA of its "continuing duty" to provide her with a reasonable accommodation (in this case, a leave of absence.) "We conclude as a matter of law, that . . . MHA had an affirmative duty under the ADA to explore further methods of accommodation before terminating Humphrey." App. 18a.[2]

## REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision raises two important questions under the ADA, both of which implicate a conflict among the courts of appeals. The first question is whether an employer violates the ADA when the employer does not offer an accommodation for a second time that the employee knows about and already has rejected. The second question is whether a leave of absence can ever constitute a reasonable accommodation under the ADA where there is no effort to define the duration of the leave, and whether an employee must demonstrate that such a leave would likely enable her to perform the functions of the job adequately upon her return. The Ninth Circuit's resolution of both of these questions cannot be reconciled with the decisions of other federal circuits, and reflects a fundamental

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[2] Although the parties disputed whether Humphrey asked for a leave of absence at the time of her termination (MHA contends she did not), this dispute made no difference to the Ninth Circuit, for the panel found that MHA had a duty to offer Humphrey a leave of absence *before* her termination and without any specific request from her. App. 18a.

misunderstanding of the terms, structure, and intent of the ADA.

1. The Ninth Circuit's holding that MHA violated the ADA because it did not offer Humphrey a leave of absence conflicts with a decision of the Sixth Circuit, and is in serious tension with the decisions of numerous other circuits. These circuits have held that an employee's rejection of an accommodation and her failure specifically to request a self-evident accommodation precludes her from recovering in an ADA action. The position of the Ninth Circuit, which relieves an employee of any responsibility to suggest an accommodation that she knows about and already has rejected, cannot be squared with the ADA's terms, structure, or purpose.

2. The Ninth Circuit also required MHA to offer Humphrey a leave of absence without demanding any proof as to the length of the leave necessary to enable her to return to work. The panel's only limitation on imposing a leave of absence requirement was that the leave must "plausibly" enable Humphrey to perform her job adequately. The panel explicitly rejected the higher standard of "likely." This holding conflicts with numerous courts of appeals in two ways. First, several courts of appeals recognize that a leave of indefinite duration is never a reasonable accommodation because its indefinite duration prevents an employer from assessing the burdens it will face by allowing an employee to stay out of work. Second, the Eleventh Circuit requires an employee to demonstrate that the leave will "likely" enable her to return to work before the employer must offer leave as a reasonable accommodation, and not the lower standard of "plausibly."

## I. THE NINTH CIRCUIT'S HOLDING THAT AN EMPLOYER VIOLATES THE ADA BY NOT OFFERING AN ACCOMMODATION THAT THE EMPLOYEE KNOWS ABOUT AND ALREADY HAS REJECTED CONFLICTS WITH A DECISION OF THE SIXTH CIRCUIT AND WITH THE TERMS AND STRUCTURE OF THE ADA.

The Ninth Circuit concluded that MHA had "a continuing duty" to explore further methods of accommodation before terminating Humphrey, App. 22a, even "assum[ing] that Humphrey turned down [MHA's earlier offer of] the leave of absence." App. 20a. In other words, the Ninth Circuit held that MHA was liable under the ADA for failing to offer a leave of absence for a second time as a "reasonable accommodation," even if Humphrey knew about the leave of absence option and refused to take it. That holding conflicts with the position of the Sixth Circuit, and is in tension with many other circuits. These courts hold that an employee's failure to accept a reasonable accommodation and/or to suggest one that is obvious to her precludes her ADA claim.

1. The ADA prohibits an employer from "not making reasonable accommodations" to the "known physical or mental limitations of an otherwise qualified individual with a disability." 42 U.S.C. § 12112(b)(5)(A). The regulations and guidelines to the ADA recommend that an employer *and* employee engage in an "interactive process" in order "to determine the appropriate reasonable accommodation," 29 C.F.R. § 1630.2(o), and that such accommodation is "best determined through a flexible, interactive process that involves both the employer and the qualified individual with a disability." 29 C.F.R. Pt. 1630, App. § 1630.9. The regulations also make explicit the employee's role in finding and accepting reasonable accommodations, providing that if a "qualified individual with a disability ... rejects a

reasonable accommodation . . . , the individual will not be considered a qualified individual with a disability." 29 C.F.R. § 1630.9(d).

The Ninth Circuit's view that an employer violates the ADA by not offering a reasonable accommodation to an employee that the employee not only knows about, but already has rejected, conflicts with the Sixth Circuit's decision in *Hankins v. The Gap, Inc.*, 84 F.3d 797, 798-99 (6th Cir. 1996), a case upon which the district court heavily relied. App. 37a-38a. In *Hankins*, the employee alleged that her disability of migraine headaches caused her to make several performance errors that led to her termination. The employee argued that to accommodate her disability, she should have been transferred to a less strenuous department. 84 F.3d at 799.

The Sixth Circuit rejected her claim, holding that her employer already had offered her a reasonable accommodation that she rejected, namely, periodic leave time for when she experienced migraines. *Id.* The court noted that the employee had ample paid sick leave, personal days, vacation, and other time off which she never used. *Id.* at 801. When the employee argued that her employer had a duty to "notify" her of these possibilities or "recommend" that she stop working to attend to her migraines, the court observed, "[w]hile it is true that an employer should normally advise an employee of available accommodations once the employee informs the employer that an accommodation is needed, it is equally true that an employer has no duty to reiterate self-evident options to an employee when she is clearly already aware of them." *Id.* Accordingly, the employee's "refusal to accept available accommodations precludes her from arguing that other accommodations should also have been provided." *Id.* at 802. *See also Webster v. Methodist Occupational Health Centers, Inc.*, 141 F.3d 1236, 1238 (7th Cir. 1998) ("An

employee cannot refuse reasonable accommodations during the interactive process the statute contemplates, and then after dismissal suggest something different and claim that the employer still has the duty to consider further accommodations."). Despite the district court's reliance on the clear language of *Hankins*, the Ninth Circuit never addressed *Hankins* in its opinion.

The Ninth Circuit's decision also cannot be reconciled with *Mole v. Buckhorn Rubber Products, Inc.*, 165 F.3d 1212 (8th Cir. 1999). In *Mole*, the Eighth Circuit made clear not only that an employee has a duty to suggest accommodations that would be helpful to her, but also that the employee must exercise that duty prior to being terminated. In *Mole*, the employee, whose employer had accommodated her disability by offering her several leaves of absence, was terminated after a series of performance problems. *Id.* at 1216. After being notified of her termination, the employee suggested a number of accommodations for her disability. *Id.* The Eighth Circuit dismissed her action, holding that it was critical that the plaintiff never advised her employer "what accommodation specific to her position and workplace was needed." *Id.* at 1217. According to the Eighth Circuit, the employee could not "expect the employer to read her mind and know she secretly wanted a particular accommodation and then sue the employer for not providing it." *Id.* at 1218 (citation omitted). Moreover, Mole's request for accommodation on the day of her termination, like the alleged request in this case, was in the Eighth Circuit's view "a request for reinstatement, not a timely request for on-the-job accommodations," for the employee "could offer no assurance the requested accommodations would remedy her many job performance deficiencies." *Id.*

The Eighth Circuit's approach in *Mole* cannot be squared with the Ninth Circuit's decision in this case. Here, the Ninth Circuit assumed that Humphrey previously had

rejected an offer of a leave of absence. In those circumstances, as the Eighth Circuit understood in *Mole*, MHA cannot be required to "read her mind" and determine that, in fact, she wanted a leave of absence. In addition, even assuming Humphrey requested a leave at the time of her termination – which MHA submits she did not do – such a request would be untimely under *Mole*.

Other circuits have suggested that an employee must actively participate in identifying accommodations that would be helpful to her to satisfy *her* duty to engage in the interactive process. For example, the Fifth Circuit in *Taylor v. Principal Financial Group, Inc.*, 93 F.3d 155 (5th Cir. 1996), observed:

> [w]here the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer, as is often the case when mental disabilities are involved, the initial burden rests primarily upon the employee, or his health-care provider, to specifically identify the disability and resulting limitations, *and to suggest the reasonable accommodations*. . . . [*A*] *disabled employee cannot remain silent and expect his employer to bear the initial burden of identifying the need for, and suggesting, an appropriate accommodation.*

*Id.* at 165 (emphasis added). *See also Loulseged v. Akzo Nobel Inc.*, 178 F.3d 731, 735 n.4 (5th Cir. 1999) ("Employers cannot be expected to anticipate all the problems that a disability may create on the job and spontaneously accommodate them . . . . [T]he imposition of this burden on employees [to advise of specific accommodation requests] underscores our recognition of the employer's inability to 'read minds' and the need for

disabled employees to remain active in the development of solutions to their concerns").[3]

2. The Ninth Circuit's rationale is also inconsistent with the letter and spirit of the ADA. The Act specifically prohibits an employer from "not making reasonable accommodations to the *known* limitations of an otherwise qualified individual with a disability." 42 U.S.C. § 12112(b)(5)(A) (emphasis added). "Qualified individual with a disability," in turn, is defined as an individual who, "with or without reasonable accommodations, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). Thus, by its terms, unless the limitations and accommodations are known to the employer, the Act envisions some participation by the employee in providing information (or knowledge) about the employee's limitations and potential accommodations. The ADA's purpose – to provide employment opportunities for the disabled – also is consistent with placing some obligation on the employee to suggest accommodations that would be helpful to her and that she knows are available.

Any other reading would promote an unduly punitive statute that punishes an employer for not failing to offer an accommodation that may not be apparent, but rewards an

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[3] *See also, e.g., Phelps v. Optima Health, Inc.*, 2001 WL 563921, at *4-5 (1st Cir. May 30, 2001) (holding that an employer cannot be liable under the ADA when the employee "turned down several job opportunities suggested by [the human resources manager] and placed significant conditions on her reassignment severely limiting [the employer's] flexibility"); *Jones v. United Parcel Serv.*, 214 F.3d 402, 408 (3d Cir. 2000) (precluding ADA claim where the employee failed to ask the employer for new position, and rejecting employee's claim that the employer "should have known" of the employee's desire for accommodation); *Sieberns v. Wal-Mart Stores, Inc.*, 125 F.3d 1019, 1023 (7th Cir. 1997) (no employer liability under the ADA when the employee did not propose any accommodations).

employee for withholding such information. For that reason, the regulations make clear that if the failure to achieve reasonable accommodation is not achieved stems from the employee's acts, liability for the employer does not ensue. *See* 29 C.F.R. § 1630.9(d) (if a "qualified individual with a disability . . . rejects a reasonable accommodation . . . , the individual will not be considered a qualified individual with a disability.").

The Ninth Circuit assumed that an employer must provide an accommodation even where the employee specifically could have requested the accommodation but did not because such a rule "encoura[ges] employers to seek to find accommodations that really work, and . . . avoid[s] the creation of a perverse incentive for employees to request the most drastic and burdensome accommodation possible out of fear that a lesser accommodation might be ineffective." App. 19a. That concern is unfounded. A rule that requires employees to suggest all conceivable accommodations would not necessarily bind the employee to any specific accommodation; to the contrary, it allows both the employer and the employee to discuss which of the options are most effective and reasonable. But an employer should be able to rely on an employee's representation – either implicit (because she has not asked) or explicit (because she has said so, as was assumed in this case) – that she is not willing to accept an accommodation that is readily available to her. An opposite rule – which requires the employer to offer all accommodations, even those accommodations that the employee explicitly has rejected – could ultimately promote actions that are inconsistent with the design of the Act by encouraging employers to force accommodations on employees for fear that a failure to do so will subject the employer to ADA liability.

The Ninth Circuit's holding leads to employer liability in ways that Congress could never have intended. Under the

Ninth Circuit's rule, the employer can never be sure that it has done all it can to accommodate a worker before terminating her employment, for there always is a chance that if the employer had asked the employee just one more time, the employee would have agreed to the accommodation. Nothing in the ADA or the case law of any other circuit supports such an outcome.

## II. THE NINTH CIRCUIT'S HOLDING THAT A LEAVE OF ABSENCE THAT MIGHT "PLAUSIBLY" ENABLE THE EMPLOYEE TO RETURN TO WORK CONSTITUTES A REASONABLE ACCOMMODATION, NOTWITHSTANDING THE ABSENCE OF ANY EVIDENCE AS TO THE DURATION OF THE LEAVE, CONFLICTS WITH THE DECISIONS OF NUMEROUS COURTS OF APPEALS.

In sharp contrast to several courts of appeals that hold an indefinite leave of absence to be *per se* unreasonable, the Ninth Circuit held that MHA should have provided Humphrey with a leave of absence without requiring any evidence concerning how long the leave needed to be or whether the leave was likely to enable Humphrey to perform her job. Dr. Jacisin's letter, with its "some time off" language, does not provide MHA with any idea as to the length of the necessary leave or the likelihood that the leave would improve Humphrey's condition. The Ninth Circuit's view presents fundamental questions about the scope of the ADA's reasonable accommodation requirement, specifically regarding whether an employer must bear undefined costs toward an accommodation that may ultimately prove ineffective.

1. While the ADA provides several examples of accommodations that may be reasonable in appropriate circumstances, neither the Act nor the regulations list a leave

of absence as a reasonable accommodation.[4] A reference to a leave of absence appears only in the Appendix to the regulations, which consists of the EEOC's Interpretive Guidance to the ADA.[5] There, the EEOC provides that "other accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment . . . ." 29 C.F.R. Pt. 1630, App. § 1630.2(o).

The Ninth Circuit's imposition of a leave of absence requirement without any proof as to the duration of the leave is inconsistent with the opinions of several other circuit courts. In *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995), a case MHA cited in its Ninth Circuit briefs but the panel never addressed, the employee alleged that his employer failed to reasonably accommodate his disability by refusing to grant him a period of time in which to cure his disabilities. *Id.* at 282. Because the employee set "no temporal limit" to the desired period of leave, the court granted summary judgment for the employer, holding that the employee's requested

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[4] The ADA provides that the following accommodations may be reasonable: (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. 42 U.S.C. § 12111(9).

[5] Although this Court has declined to rule on the deference owed to the EEOC's Interpretive Guidance, *see Sutton v. United Airlines*, 527 U.S. 471, 480 (1999), that guidance should be entitled to less deference than the regulations. *See, e.g., Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70 n.6 (1986) ("EEOC guidelines are properly accorded less weight than administrative regulations declared by Congress to have the force of law."); *Smith v. Midland Brake*, 180 F.3d 1154, 1165 n.5 (10th Cir. 1999).

accommodation was *per se* unreasonable. According to Chief Judge Wilkinson's opinion for the court, "reasonable accommodation does not require [the employer] to wait indefinitely for [the employee's] medical conditions to be corrected, especially in light of the uncertainty of the cure." *Id.* at 283.

The decisions of the First, Second, Fifth, Sixth, Seventh, Tenth and Eleventh Circuits are in accord. *See, e.g., Watkins v. J & S Oil Co.*, 164 F.3d 55, 62 (1st Cir. 1998) (affirming district court's conclusion that an employee's request that his employer leave his position open for an indefinite period of time was unreasonable as a matter of law); *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 338 (2d Cir. 2000) ("The duty to make reasonable accommodations does not, of course, require an employer to hold an injured employee's position open indefinitely."); *Rogers v. International Marine Terminals*, 87 F.3d 755, 759 (5th Cir. 1996) ("While [the employee] contends that IMT was required to accommodate him by allowing him to enjoy indefinite leave, this argument is meritless. . . . Nothing in the text of the reasonable accommodation provision requires an employer to wait an indefinite period for an accommodation to achieve its intended effect."); *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1047 (6th Cir. 1998) ("Reasonable accommodation does not require the employer to wait indefinitely for an employee's medical condition to be corrected.") (citation omitted); *Nowak v. St. Rita High School*, 142 F.3d 999, 1004 (7th Cir. 1998) ("The ADA does not require an employer to accommodate an employee who suffers a prolonged illness by allowing him an indefinite leave of absence."); *Hudson v. MCI Telecomms. Corp.*, 87 F.3d 1167, 1169 (10th Cir. 1996) ("[T]he ADA does not require an employer to grant an employee indefinite leave as an accommodation."); *Duckett v. Dunlop Tire Corp.*, 120 F.3d 1222, 1226 (11th Cir. 1997) (following the Fourth Circuit's decision in *Myers*). *Cf. Boykin v.*

*ATC/Vancom of Colorado, L.P.*, 247 F.3d 1061, 1064 (10th Cir. 2001) (an employer's duty to reassign a disabled employee does not obligate the employer "to place a disabled employee on indefinite leave until a position for which he is qualified opens up.").

2. The Ninth Circuit's decision departs from the other circuits in another related way. The court below did not require Humphrey to show that a leave of absence would "likely" accommodate her disability by enabling her to return to work in the future. Rather, without citing any ADA case law, the panel explicitly held that the "ADA does *not* require an employee to show that a leave of absence is *likely* to be successful." App. 15a (emphasis added). The panel instead relied upon a Ninth Circuit case that interpreted the State of Washington's civil rights law to hold that a leave is reasonable so long as the employee can "satisfy the *minimal* requirement that a leave could *plausibly* have enabled [the employee] adequately to perform her job." App. 15-16a (emphasis added).

Other circuits interpreting the ADA have required more from an employee seeking to prove that a leave of absence is reasonable. In *Duckett v. Dunlop Tire Corp.*, 120 F.3d 1222 (11th Cir. 1997), for example, the employee argued that rather than terminating him, his employer should have allowed him to continue on leave for at least the remaining two months provided by the employer's salary continuation program. The Eleventh Circuit rejected this argument because the employee "could not represent that he *likely* would have been able to work within a month or two," and "had no way of knowing when his doctor would allow him to return to work in any capacity." *Id.* at 1226 (emphasis added). His request for leave was therefore treated as one for an indefinite duration, and unreasonable. The Eleventh Circuit's "likely" requirement directly conflicts with the

Ninth Circuit's opinion, which explicitly rejected "likely" as the proper standard. App. 15a.

The Tenth Circuit similarly requires that an employee present some evidence to demonstrate that a leave of absence will allow her to resume her duties, generally in the form of evidence regarding the duration of the employee's impairment. *Hudson v. MCI Telecomms. Corp.*, 87 F.3d 1167, 1169 (10th Cir. 1996), is an example. There, although the employee set forth evidence from her treating physician that her impairment was not "permanent," the Tenth Circuit rejected her claim that she was entitled to a leave of absence, holding that the plaintiff failed to "present any evidence of the expected duration of her impairment as of the date of her termination," such as "when she could expect to resume her regular duties." *Id.* The Tenth Circuit has explained the reason for its rule: "Without an expected duration of an impairment, an employer cannot determine whether an employee will be able to perform the essential function of the job *in the near future* and therefore whether the leave request is a 'reasonable' accommodation." *Cisneros v. Wilson*, 226 F.3d 1113, 1130 (10th Cir. 2000), *overruled on other grounds by Board of Trustees v. Garrett*, 121 S. Ct. 955 (2001). In other words, the Tenth Circuit views the duration of an employee's impairment as a gauge of the likelihood that she will resume her duties in the near future – the longer the employee's impairment, the less likely she is to return to work within a reasonable time period. Simply put, as in the Eleventh Circuit, an employee in the Tenth Circuit must demonstrate significantly more than merely that her leave might "plausibly" have enabled her to perform her job.[6]

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[6] *See also Cisneros v. Wilson*, 226 F.3d 1113, 1130 (10th Cir. 2000) ("this court has required an employee to provide an *expected duration of the impairment* (not the duration of the leave request)."), *overruled on other grounds by Board of Trustees v. Garrett*, 121 S. Ct.

3. The circuits that have held that an indefinite leave is *per se* unreasonable have come to this conclusion for two important reasons. First, an indefinite leave places the employer in an unenviable business position: the employer must hire "temporary" workers – often for prolonged periods – to fill the position of a disabled employee, without any idea of when, or even whether, the disabled employee will return to work. The Fourth Circuit in *Myers* described this quandary in addressing why the defendant-county was not required to provide an indefinite leave to a disabled bus driver:

> [i]n mandating only those modifications that qualify as reasonable, Congress clearly meant to avoid placing employers in an untenable business position. [The plaintiff's] requested accommodation, however, would do just that. The County must promptly fill transit positions with qualified drivers lest public vehicles go unmanned; every business day, there are routes to be serviced and passengers to be transported. For the County to be forced to stand by – or hire temporary help – while [the plaintiff] endeavors to improve his failing health would be a significant burden.

50 F.3d at 283 (internal citations omitted).

Moreover, a *per se* rule rejecting indefinite leave comports with the text of the ADA. Under the statute, the term "qualified individual with a disability" is an "individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the position that such individual holds or desires." 42 U.S.C. § 12111(8). Notably, in defining which individuals are

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955 (2001); *Taylor v. Pepsi-Cola Co.*, 196 F.3d 1106, 1110 (10th Cir. 1999) (no ADA violation where a plaintiff "failed to present evidence of the expected duration of the impairment.").

"qualified," the Act uses the present tense, *i.e.*, "*can* perform the essential functions" not "*will* or *may be able to* perform the essential functions." As the Fourth Circuit in *Myers* observed, "these provisions contain no reference to an individual's *future* ability to perform the essential functions of his position. . . . Rather, reasonable accommodation is by its terms most logically construed as that which *presently, or in the immediate future,* enables the employee to perform the essential functions of the job in question." 50 F.3d at 283 (latter emphasis added). In an analogous context – interpreting the definition of "disability" – this Court has emphasized the importance of interpreting provisions of the ADA by reference to the tense used: "Because the phrase 'substantially limits' appears in the Act in the present indicative verb form, we think the language is read as requiring that a person be presently – not potentially or hypothetically – substantially limited in order to demonstrate a disability." *Sutton v. United Airlines, Inc.*, 527 U.S. 471, 482 (1999).

The Ninth Circuit's approval of indefinite leave has significant real world consequences for employers. The ADA undoubtedly requires employers to incur costs in accommodating disabled employees. For instance, requiring an employer to provide a new keyboard or a sign language interpreter to an employee imposes costs on the employer. The ADA nonetheless might require these accommodations if they are "reasonable" under the circumstances and do not impose an "undue hardship." And because there is a defined cost associated with these accommodations, the employer can assess whether the cost is reasonable under the circumstances, *i.e.*, that it does not outweigh the benefit of providing the accommodation.

Where the Ninth Circuit's decision diverges from the approach of the other courts of appeals is in requiring employers to assume a cost that is undefined and potentially

unjustified. Even a leave of absence for a definite period is, by its nature, somewhat speculative. Unlike the computer keyboard or sign language interpreter, there is no way to know for certain if the leave of absence will cure the employee's impairment. But an indefinite leave of absence, particularly one that is not supported by any suggestion that it is likely to help the employee, imposes a significantly greater burden on the employer. An employer that must allow an employee an indefinite leave of absence cannot determine whether the leave is reasonable under the circumstances because it simply does not know what the circumstances are. For the same reason, the employer cannot determine whether allowing such leave poses an undue hardship, and thus cannot defend against an ADA claim even on this ground. Moreover, without any information about whether such a leave would allow the employee to return to work, the employer cannot assess whether the burden would be reasonable compared to the benefit. Anything is "plausible." What is meaningful to the employer is whether something is "likely." Accommodation without any understanding of the costs associated with it is, by definition, unreasonable.

This Court should grant certiorari to clarify if and when a leave of absence is a reasonable accommodation under the ADA.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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# APPENDIX

**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 98-15404

D.C. No. CV-96-06025-REC

CAROLYN HUMPHREY,

*Plaintiff-Appellant,*

v.

MEMORIAL HOSPITALS ASSOCIATION

*Defendant-Appellee*

Appeal from the United States District Court for the Eastern District of California (Fresno)

Robert E. Coyle, District Judge, Presiding

Filed February 13, 2001

Before: KRAVITCH,[1] REINHARDT, and T.G. NELSON, Circuit Judges.

OPINION

REINHARDT, Circuit Judge:

Carolyn Humphrey brought suit against her former employer, Memorial Hospitals Association (MHA), under the Americans with Disabilities Act (ADA) and its California counterpart, the Fair Employment and Housing Act (FEHA) for failure to reasonably accommodate her disability and wrongful termination. We reverse the district court's grant of summary judgment in favor of MHA.

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[1] The Honorable Phyllis A. Kravitch, Senior Judge, United States Court of Appeals for the Eleventh Circuit, sitting by designation.

## I. BACKGROUND

Humphrey worked for MHA as a medical transcriptionist from 1986 until her termination in 1995. At the time of her termination, she was earning approximately $11.00 per hour. Throughout her employment at MHA, Humphrey's transcription performance was excellent and consistently exceeded MHA's standards for speed, accuracy, and productivity.

In 1989, Humphrey began to experience problems getting to work on time, or at all. She engaged in a series of obsessive rituals that hindered her ability to arrive at work on time. She felt compelled to rinse her hair for up to an hour, and if, after brushing her hair, it didn't "feel right," she would return to the shower to wash it again. This process of washing and preparing her hair could take up to three hours. She would also feel compelled to dress very slowly, to repeatedly check and recheck for papers she needed, and to pull out strands of her hair and examine them closely because she felt as though something was crawling on her scalp. She testified that these obsessive thoughts and rituals made it very difficult to get to work on time. Once she realized that she was late, she would panic and become embarrassed, making it even more difficult for her to leave her house and get to work.

Due to Humphrey's difficulties with tardiness and absenteeism, MHA gave her a "Level I" disciplinary warning in June 1994. This warning required her to call her supervisor before the time she was due to be at work if she was going to be late or absent. Humphrey's mental obsessions and peculiar rituals only grew worse after the warning, and her attendance record did not improve; nor did her call-in rate. In December 1994, she received a "Level III" warning, which documented four tardy days and one unreported absence over a two week period.

When MHA gave Humphrey the Level III warning, she was told that she was expected to schedule and keep counseling appointments with the Employee Assistance Program (EAP). This counseling consisted of "tips," helpful hints such as getting up earlier and laying out clothes the night before. Humphrey found this somewhat helpful and attended several sessions, but her efforts to follow the "tips" were not particularly successful. After watching an episode of the Oprah Winfrey show devoted to attention deficit disorder, Humphrey began to suspect that her debilitating symptoms and inability to get to work on time might be related to a medical condition. In May, 1995, she asked MHA's EAP nurse, Elizabeth Pierson, if she could see a psychiatrist for an evaluation. Pierson agreed, and set up an appointment for a diagnostic evaluation and psychological testing with Dr. John Jacisin. MHA paid for the consultation through its EAP program.

Humphrey first saw Dr. Jacisin on May 12, 1995. Dr. Jacisin diagnosed her with obsessive compulsive disorder (OCD).[2] He sent a letter explaining that diagnosis to Pierson on May 18, 1995, telling her that Humphrey's OCD "is directly contributing to her problems with lateness." In addition, the letter stated:

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[2] Individuals with obsessive compulsive disorder experience obsessions or compulsions or both. *See* American Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 417 (4th ed.1994). Obsessions are recurring or persistent thoughts, images, or impulses that, rather than being voluntarily produced, seem to invade a person's consciousness despite his attempts to ignore, suppress, or control them. *See id.* at 418. Compulsions are urges or impulses to commit repetitive acts that are apparently meaningless, stereotyped, or ritualistic. *See id.* The disorder was recently made famous by Jack Nicholson's Oscar-winning portrayal of a man with OCD in the 1998 film *As Good As it Gets*.

> I believe that we can treat this, although, the treatment may take a while. I do believe that she would qualify under the Americans with Disability Act, although, I would like to see her continue to work, but if it is proving to be a major personnel problem, she may have to take some time off until we can get the symptoms better under control.

Humphrey sought treatment from Dr. Jacisin and from a psychologist, Dr. Litynsky. Dr. Litynsky, like Dr. Jacisin, diagnosed Humphrey with OCD and concluded that it was probable that the OCD caused her absenteeism and tardiness. Humphrey had difficulty paying for the necessary services, however, because her insurance did not cover the treatment. In addition, due to the severe symptoms of her ailment, Humphrey had great difficulty showing up for appointments. Both doctors considered her inconsistency in treatment in 1995 and 1996 to be the result of the disorder as well as her financial problems.[3]

On June 7, 1995, Humphrey met with Pierson and Humphrey's supervisor, Carol Evans-Bowlsby, to review Dr. Jacisin's letter. What happened at this meeting is disputed. MHA contends that Humphrey rejected the leave of absence alluded to in the doctor's letter. Humphrey says that she was never offered a leave of absence and never rejected one. Instead, she testified that "they asked if I would like to keep working. And I said yes." She did not remember anyone using the term "leave of absence." (As it turns out, this factual dispute is not material to our ruling on appeal.)

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[3] Dr. Litynsky testified, "[h]er obsessive compulsive disorder was certainly the primary factor in her inability to appear for most of her missed sessions with me. If the same set of events were occurring while she was employed, I would believe that it was very likely a major factor in her nonappearance at work."

Humphrey did want to try to keep working, if possible, and Pierson told her that she could have an "accommodation" that would allow her to do so. Pierson suggested, as an accommodation, that Humphrey have a friend or family member drive her to work every day. Humphrey said that this suggestion would not be feasible. Pierson next offered a flexible start-time arrangement in which Humphrey could begin work any time within a 24 hour period on days on which she was scheduled to work. Pierson asked her to think about whether this would help her and whether any other accommodation would be desirable, and asked her to submit any additional requests for accommodation in writing. A few days later, Humphrey sent Pierson a letter accepting the flexible start time arrangement, and saying that she "would still do my best to be at my work station at the earliest possible hour."

Nevertheless, Humphrey continued to miss work. It is disputed whether Humphrey's supervisor warned her about her conduct during the remainder of that summer. It is undisputed, however, that no one from MHA broached the subject of modifying the accommodation during that period. On September 18, 1995, Humphrey, upset about her continuing problems, sent Pierson an e-mail message asking for a new accommodation because the then-current one seemed to be failing:

> Dear Liz:
>
> It has now been a few months since I sent you a memo regarding how my disability would best be accommodated as far as my job performance. I have since come to the conclusion that I would be able to put in considerable more hours [sic] and be much more productive if I were able to work from my home as a lot of other transcriptionists are doing.... I think this would be the ideal way to accommodate my diagnosed disability.

MHA allows certain medical transcriptionists to work out of their homes. Dr. Jacisin was not asked by anyone at MHA for his opinion on the work-at-home request. After Humphrey's termination, Jacisin said that working at home "might accommodate some of her work issues" but might be "anti-therapeutic." He testified, in his deposition in this lawsuit, that he felt working at home was an accommodation which would have been worth trying because it was necessary for Humphrey to earn money and increase her self-confidence.

In any event, Humphrey's request was summarily denied. In an e-mail message, Pierson denied her request for work-at-home accommodation on the ground of Humphrey's disciplinary warnings for tardiness and absenteeism. Pierson did not suggest an alternative accommodation or indicate that MHA would be receptive to reassessing its arrangements to accommodate Humphrey in light of the apparent failure of the flexible work schedule arrangement. Instead, she wrote:

> It is departmental policy that if you are involved in any disciplinary action you are ineligible to be a home based transcriptionist as per the AT HOME ARRANGEMENT FOR TRANSCRIPTIONISTS. Since you are currently involved in the discipline process, you are ineligible for being based at home. During our 6/7/95 meeting, you requested to be accommodated for your disability by having a flexible start time, stating that you would have no problems staying for a full shift once you arrived. You were given this flexible start time accommodation which continues to remain in effect. As for your productivity, your manager indicated that you consistently meet your hourly productivity requirements when you are at work.

Pierson's comment regarding Humphrey's productivity at work was typical of Humphrey's performance evaluations, which recognized her high level of competence but were

tarnished by the problems caused by her disability. For example, in her annual performance review completed on September 26, 1995-- approximately two weeks before she was terminated--Humphrey exceeded expectations in minutes typed per shift and in errors per 130 lines checked. She was one of the only transcriptionists who could accurately transcribe the comments of a particular group of physicians. Her review noted that this was "a very difficult task as the majority of physicians speak with very pronounced accents. You have done this very well as you have learned the accents and have become familiar with the styles." She was regarded as very cordial, considerate, honest, and tactful.

Humphrey's evaluation indicates that were it not for her ailment, she would have been a model employee. The only negative ratings she received were in relation to the problems caused by the interference of her symptoms and the accommodation of flexible start time.[4] Her evaluation stated that her recent unscheduled absences were "unacceptable," and advised that correcting her attendance problem was "a major goal for the upcoming year." During a meeting with her supervisor, Julie Vieira, to discuss her evaluation, Humphrey again raised the issue of working at home, but was told that she would have to be free of attendance problems for a year before she could be considered for an at-home transcriptionist position. Neither Humphrey nor her supervisor suggested a medical leave of absence at this meeting.

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[4] For example, she was criticized because she was "not able to learn and transcribe Pathology because of your inconsistent work hours. You are scheduled to start work at 10:00 a.m. but do not come to work before 4:00 p.m. which is after the deadline FOR Pathology." However, at this time Humphrey had been given permission to arrive at work after 4:00 p.m. in accordance with the flexible start-time accommodation.

Humphrey was absent two more times, and on October 10, 1995, Vieira fired her. MHA's stated reason for the termination was Humphrey's history of tardiness and absenteeism. Humphrey testified that after learning of her termination, she went across the hall to Pierson's office and asked if she might take a leave of absence instead of lose her job, but that Pierson refused and told her that she had had her chance at accommodation. Pierson denies that Humphrey requested a leave of absence on the day of her discharge. MHA concedes that it would have granted the request if Humphrey had asked for a leave of absence prior to her termination, as MHA had a policy of permitting medical leaves of absence to employees with disabilities.

On September 6, 1996, Humphrey brought suit against MHA for violation of the ADA and the FEHA.[5] The district court granted MHA's motion for summary judgment on the theory that MHA had satisfied its duty to reasonably accommodate Humphrey's disability. The district court found it "dispositive ... that Plaintiff was initially offered a leave of absence and rejected it, and then failed to request a leave of absence subsequently." Humphrey appeals the judgment entered in favor of MHA.

## II. DISCUSSION

Humphrey contends that MHA violated the ADA and the FEHA by failing to reasonably accommodate her disability

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[5] Humphrey also brought claims for violation of the Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654, and the California Family Rights Act, Cal.Govt.Code § 12945.2. However, Humphrey does not appeal the adverse judgment on those claims.

and by terminating her because of that disability. The ADA[6] provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability...." 42 U.S.C. § 12112(a). Title I of the ADA insures full opportunities for people with disabilities in the workplace by requiring reasonable accommodation of employees' disabilities by their employers. Under the ADA, the term "discriminate" is defined as including "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." 42 U.S.C. § 12112(b)(5)(A). To prevail on a claim of unlawful discharge under the ADA, the plaintiff must establish that he is a qualified individual with a disability and that the employer terminated him because of his disability. *Cooper v. Neiman Marcus Group*, 125 F.3d 786, 790 (1997). The ADA defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). A "disability" is "a physical or mental impairment that substantially limits one or more of

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[6] Because the FEHA provisions relating to disability discrimination are based on the ADA, decisions interpreting federal anti- discrimination laws are relevant in interpreting the FEHA's similar provisions. See *Brundage v. Hahn*, 57 Cal.App.4th 228, 235, 66 Cal.Rptr.2d 830 (Cal.Ct. App.1997). We analyze Humphrey's state and federal disability claims together, relying on federal authority in the absence of contrary or differing state law. *See id.*

the major life activities of such individual."[7] 42 U.S.C. § 12102(2)(a).

In ADA cases, as in all appeals, we review a grant of summary judgment de novo. *McAlindin v. County of San Diego*, 192 F.3d 1226, 1232 (9th Cir.), *amended* 201 F.3d 1211, and *cert. denied*, 530 U.S. 1243, 120 S.Ct. 2689, 147 L.Ed.2d 961 (2000).

A. QUALIFIED INDIVIDUAL WITH A DISABILITY

Because the district court granted summary judgment to MHA on the ground that it reasonably accommodated Humphrey, the court did not address whether Humphrey is a qualified individual with a disability. However, MHA asks us to uphold the judgment on the alternate ground that Humphrey is not disabled and that she is not a "qualified individual" for purposes of the ADA. Because we reject MHA's reasonable accommodation argument, we consider its alternate ground here.

Most of the issues relating to Humphrey's status as a qualified individual with a disability are legal. The primary factual dispute arises out of an equivocal report and declaration by defense expert Dr. Weissman. The report raises some question regarding the testimony of Drs. Jacisin and Litynsky that Humphrey suffered from OCD and that her condition caused her attendance problems. Dr. Weissman declares that although Humphrey may have suffered from OCD with psychotic features while employed by MHA, it is also possible that she was suffering from brief psychotic delusional episodes rather than OCD. He continues in his report: "It is a mistake to assume that the only explanation

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[7] The statute's definition also includes "having a record of such an impairment," 42 U.S.C. § 12102(2)(B), or "being regarded as having such an impairment," 42 U.S.C. § 12102(2)(C). Humphrey argues only that she has an actual impairment under § 12102(2)(A).

for her tardiness (or of anyone's) was obsessive compulsive disorder. There are lots of other problems that can result in chronic tardiness. And alternate sources of stress were operating in 1994 in Ms. Humphrey's life." If, as Dr. Weissman suggests, Humphrey's difficulties getting to work may not have stemmed from OCD but may have been attributable to other "problems," it is possible that Humphrey might not be a qualified individual with a disability under the ADA. Because Humphrey does not seek summary judgment, we need not determine whether the conclusory and somewhat ambiguous statements of Dr. Weissman are sufficient to create a triable issue of fact as to whether she is a qualified individual with a disability (OCD or otherwise). Rather, for purposes of this appeal, we will assume without deciding that MHA has presented sufficient evidence to survive summary judgment on this point.

MHA also argues that Humphrey is not disabled for purposes of the ADA because she is not substantially limited in one or more of her major life activities. The EEOC regulations provide that "caring for oneself" is a major life activity. 29 C.F.R. § 1630.2(i). According to the EEOC, "[a]n impairment substantially limits an individual's ability to care for him/herself if, due to the impairment, an individual is significantly restricted as compared to the average person in the general population in performing basic activities such as getting up in the morning, bathing, dressing, and preparing and obtaining food." EEOC Enforcement Guidance: Psychiatric Disabilities and the ADA, FEP (BNA) 405:7461, at 7467 (March 25, 1997)

[hereinafter EEOC Enforcement Guidance on Psychiatric Disabilities].[8]

The facts are undisputed with regard to Humphrey's ability to care for herself.[9] The testimony of Humphrey and Dr. Jacisin, her mental health provider, reflects that it took Humphrey significantly more time than the average person to accomplish the basic tasks of washing and dressing. According to Humphrey, the process of washing and brushing her hair alone could take several hours, and she at times would prepare for work from eight o'clock in the morning until five or six o'clock in the evening. Dr. Jacisin testified that, on one OCD screening test, she was rated as taking three times as long as most people to shower, wash her hands, dress, and handle or cook food. MHA argues that even if Humphrey's ritualistic behaviors caused her to take more time to complete basic activities than the average person, she is not disabled under the ADA because her OCD did not prevent her from accomplishing those activities. As the Supreme Court has noted, however, "[t]he [Americans with Disabilities] Act addresses substantial limitations on major life activities, not utter inabilities." *Bragdon v. Abbott*, 524 U.S. 624, 641, 118 S.Ct. 2196, 141 L.Ed.2d 540

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[8] By contrast, the legislative definition of a "mental disability" in the FEHA does not require that the disability substantially limit a major life activity, but merely that it "limit" a major life activity. *See* Cal.Govt.Code § 12926(1). Because a triable issue of fact exists as to whether Humphrey is disabled under the ADA, a fortiori an issue of fact also exists as to whether she is disabled under the FEHA.

[9] We need not address whether Humphrey is substantially limited in working. *See McAlindin*, 192 F.3d at 1233; EEOC Enforcement Guidance on Psychiatric Disabilities, at 7463 ("The first question is whether an individual is substantially limited in a major life activity other than working (e.g. sleeping, concentrating, caring for oneself). Working should be analyzed only if no other major life activity is substantially limited by an impairment.").

(1998). An impairment "substantially limits" one's ability to carry out a major life activity if, because of the impairment, the individual is "[s]ignificantly restricted as to the condition, manner, or duration under which an individual can perform a major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 C.F.R. § 1630.2(j). An individual who has a physical or mental impairment that causes him to take inordinately more time than others to complete a major life activity is substantially limited as to that activity under the ADA. There is no dispute on the record before us that Humphrey falls within that category. Accordingly, in determining whether Humphrey is disabled for purposes of the ADA, the question is not whether she is substantially limited in her ability to care for herself, but whether she had OCD, and, if so, whether her OCD was the cause of her limitation.

MHA next argues that Humphrey was not "qualified" for the medical transcriptionist position within the meaning of the ADA. A qualified individual is "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). It is undisputed that Humphrey had the skills, training, and experience to transcribe medical records. MHA contends that Humphrey's inability to show up for work and to notify her employer when she would be absent renders her

not otherwise qualified under the ADA[10] because regular and predictable attendance is an essential function of the position.[11] However, Humphrey is a "qualified individual" under the ADA so long as she is able to perform the essential functions of her job "with or without reasonable accommodation." 42 U.S.C. § 12111(8). Either of two potential reasonable accommodations might have made it possible for Humphrey to perform the essential functions of her job: granting her a leave of absence or allowing her to become a "home- based transcriptionist."

A leave of absence for medical treatment may be a reasonable accommodation under the ADA. *See* 29 C.F.R. 1630 app. § 1630.2(*o*). We have held that where a leave of absence would reasonably accommodate an employee's disability and permit him, upon his return, to perform the essential functions of the job, that employee is otherwise qualified under the ADA. *See Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir.1999).

MHA contends that Humphrey is not otherwise qualified because the results of the leave of absence were speculative. However, the ADA does not require an employee to show

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[10] MHA also argues that Humphrey's inability to perform her job duties extended beyond her attendance difficulties. However, the only negative comments on her evaluations are related to attendance. For example, she was unable to learn and transcribe pathology because she was unable to arrive at work consistently before the pathology department's four o'clock deadline. Her poor scores for attendance and attendance- related activities and policies resulted in a "below average" overall rating.

[11] Humphrey concedes that regular and predictable job performance is an essential function of the MHA medical transcriptionist position. We note that although excessive or unscheduled absences may prevent an employee from performing the essential functions of his job and thereby render him not otherwise qualified for purposes of the ADA, regular and predictable attendance is not per se an essential function of all jobs.

that a leave of absence is certain or even likely to be successful to prove that it is a reasonable accommodation. In *Kimbro v. Atlantic Richfield Co.*, 889 F.2d 869 (9th Cir.), *cert. denied*, 498 U.S. 814, 111 S.Ct. 53, 112 L.Ed.2d 28 (1990), we held that a leave of absence was a reasonable accommodation for an employee whose cluster migraine headaches, a condition for which there was no specific treatment program, caused him sporadically to miss work.[12] We noted that

> [w]hile it is altogether possible that Kimbro's migraine episodes may have recurred upon his return to work following a leave of absence, such a possibility does not foreclose a finding of liability for failure to accommodate Kimbro's migraines.... As long as a reasonable accommodation available to the employer could have plausibly enabled a handicapped employee to adequately perform his job, an employer is liable for failing to attempt that accommodation.

*Id.* at 879. The statements in Dr. Jacisin's letter that Humphrey's condition was treatable and that "she may have to take some time off until we can get the symptoms better under control" are sufficient to satisfy the minimal requirement that a leave of absence could plausibly have

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[12] *Kimbro* involved the Washington state handicap laws, which are similar to the ADA and the FEHA. *See Schmidt v. Safeway, Inc.*, 864 F.Supp. 991, 996 (D.Or.1994); *Prilliman v. United Air Lines, Inc.*, 53 Cal.App.4th 935, 949 n. 3, 62 Cal.Rptr.2d 142 (Cal.Ct.App.1997); *see also Sanders v. Arneson Prod. Inc.*, 91 F.3d 1351, 1354 (9th Cir.), *cert. denied*, 520 U.S. 1116, 117 S.Ct. 1247, 137 L.Ed.2d 329 (1997) (relying on *Kimbro* when construing the ADA).

enabled Humphrey adequately to perform her job.[13] We discuss in Section C below MHA's contention that it was not required to offer Humphrey a leave of absence or other accommodation unless she specifically requested it.[14]

There is another reasonable accommodation that could also serve to render Humphrey a "qualified individual." There is at least a triable issue of fact as to whether Humphrey would have been able to perform the essential duties of her job with the accommodation of a work-at-home position. Working at home is a reasonable accommodation when the essential functions of the position can be performed at home and a work-at-home arrangement would not cause undue hardship for the employer. EEOC Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act, FEP (BNA) 405:7601, at 7626 (March 1, 1999) [hereinafter EEOC Enforcement Guidance on Reasonable

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[13] Of course, the requirement to grant a leave where there are plausible reasons to believe that it would accommodate the employee's disability can not be repeatedly invoked, thus permitting an unqualified employee to avoid termination by requesting a leave of absence each time he is about to be fired. As we noted in *Kimbro*, the fact that a prior leave was granted and was unsuccessful may be a relevant consideration in determining whether additional leave would be a reasonable accommodation. *Kimbro*, 889 F.2d at 879 n. 10.

[14] We also note that an employer need not make an accommodation, including granting a leave of absence, if it poses an undue hardship. 42 U.S.C. § 12112(b)(5)(A). However, MHA makes no such contention here.

Accommodation].[15] Humphrey does not dispute that regular and predictable performance of the job is an essential part of the transcriptionist position because many of the medical records must be transcribed within twenty- four hours, and frequent and unscheduled absences would prevent the department from meeting its deadlines. However, physical attendance at the MHA offices is not an essential job duty; in fact, the record makes it clear that MHA permits some of its medical transcriptionists to work at home.

MHA denied Humphrey's application for a work-at-home position because of her disciplinary record, which consisted of Level I and Level III warnings for tardiness and absenteeism prior to her diagnosis of OCD. It would be inconsistent with the purposes of the ADA to permit an employer to deny an otherwise reasonable accommodation because of past disciplinary action taken due to the disability sought to be accommodated. Thus, Humphrey's disciplinary record does not constitute an appropriate basis for denying her a work-at-home accommodation.

Although Dr. Jacisin was less optimistic about Humphrey's working at home than he was about a leave of absence, Humphrey has submitted sufficient evidence to raise an issue of fact as to whether she could perform the job with the accommodation of a work-at-home position. She testified that her ailment interfered primarily with her ability

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[15] Courts have taken differing approaches toward working at home as an accommodation. *Compare Vande Zande v. Wisconsin Dept. of Admin.*, 44 F.3d 538, 544-45 (7th Cir.1995) (holding that an employer is not required to allow disabled workers to work at home except in extraordinary circumstances), *with Langon v. Department of Health and Human Servs.*, 959 F.2d 1053, 1060-61 (D.C.Cir.1992) (holding that an employer must consider requested accommodation of working at home), *cited with approval in Buckingham v. United States*, 998 F.2d 735, 740 (9th Cir.1993). We see no reason not to follow the approach taken by the EEOC in its Enforcement Guidance.

to leave her house in the morning. Dr. Jacisin stated that working at home "might accommodate some of her work issues," and later testified that he felt working at home would have been worth trying because "her OCD really didn't interfere necessarily with her ability to do the work, that is to actually do the typing and transcription." A reasonable jury could conclude that if Humphrey was relieved of the stress of having to leave the house, she could perform her transcriptionist duties and thus was "qualified" under the ADA.

Accordingly, we hold that MHA is not entitled to summary judgment on the issue of whether Humphrey is a "qualified individual with a disability" for purposes of the ADA.

B. BREAKDOWN OF THE INTERACTIVE PROCESS

The remaining question with respect to the duty to accommodate is a purely a legal one: was MHA obligated to suggest a leave of absence or to explore other alternatives in response to Humphrey's request for a work-at-home position, or was it Humphrey's burden to make an express request for a leave of absence before she was terminated? We conclude, as a matter of law, that (assuming Humphrey was a qualified individual with a disability) MHA had an affirmative duty under the ADA to explore further methods of accommodation before terminating Humphrey.

Once an employer becomes aware of the need for accommodation, that employer has a mandatory obligation under the ADA to engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations. *Barnett v. U.S. Air*, 228 F.3d 1105, 1114 (9th Cir.2000). "An appropriate reasonable accommodation must be effective, in enabling the employee to perform the duties of the position." *Id.* at 1115. The interactive process requires communication and good-faith exploration of possible accommodations between employers and individual

employees, and neither side can delay or obstruct the process. *Id.* at 1114-15; *Beck v. University of Wis. Bd. of Regents*, 75 F.3d 1130, 1135 (7th Cir.1996) ("A party that obstructs or delays the interactive process is not acting in good faith. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith."). Employers, who fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible. *Barnett*, 228 F.3d at 1116.

Moreover, we have held that the duty to accommodate "is a 'continuing' duty that is 'not exhausted by one effort.'" *McAlindin*, 192 F.3d at 1237. The EEOC Enforcement Guidance notes that "an employer must consider each request for reasonable accommodation," and that "[i]f a reasonable accommodation turns out to be ineffective and the employee with a disability remains unable to perform an essential function, the employer must consider whether there would be an alternative reasonable accommodation that would not pose an undue hardship." EEOC Enforcement Guidance on Reasonable Accommodation, at 7625. Thus, the employer's obligation to engage in the interactive process extends beyond the first attempt at accommodation and continues when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed. This rule fosters the framework of cooperative problem-solving contemplated by the ADA, by encouraging employers to seek to find accommodations that really work, and by avoiding the creation of a perverse incentive for employees to request the most drastic and burdensome accommodation possible out of fear that a lesser accommodation might be ineffective.

When MHA received Dr. Jacisin's letter diagnosing Humphrey with OCD, MHA properly initiated the

interactive process by arranging a meeting to discuss possible accommodations. Dr. Jacisin's statement "I would like to see her continue to work, but if it is proving to be a major personnel problem, she may have to take some time off until we can get the symptoms better under control" alerted MHA to the possibility that any initial arrangement that kept Humphrey on the job might not be effective and that a leave of absence might ultimately be necessary to accommodate her disability. In fact, it is MHA's position, disputed by Humphrey, that MHA explicitly offered her a leave at the June 7 meeting, and that it was Humphrey who decided that flexible scheduling was the better choice. Even if we assume that Humphrey turned down the leave of absence in June in favor of a flexible start-time arrangement, her attempt to perform her job functions by means of a less drastic accommodation does not forfeit her right to a more substantial one upon the failure of the initial effort.

By the time of her annual performance review in September, it was abundantly clear to MHA that the flexible start time accommodation was not succeeding; Humphrey had accumulated six unreported absences in each of the months of August and September, and her evaluation stated that her attendance record was "unacceptable." At this point, MHA had a duty to explore further arrangements to reasonably accommodate Humphrey's disability.

Humphrey also realized that the accommodation was not working, and requested a work at home position. When it received that request, MHA could have either granted it or initiated discussions with Humphrey regarding other

alternatives.[16] Instead, MHA denied her request without suggesting any alternative solutions, or exploring with her the possibility of other accommodations. Rather than fulfill its obligation to engage in a cooperative dialogue with Humphrey, Pierson's e-mail suggested that the matter was closed: "During our 6/7/95 meeting, you requested to be accommodated for your disability by having a flexible start time, stating that you would have no problems staying for a full shift once you arrived. You were given this flexible start time accommodation which continues to remain in effect." We held in *Barnett* that an employer fails to engage in the interactive process as a matter of law where it rejects the employee's proposed accommodations by letter and offers no practical alternatives. *See Barnett*, 228 F.3d at 1116-17. Similarly, MHA's rejection of Humphrey's work-at-home request and its failure to explore with Humphrey the possibility of other accommodations, once it was aware that the initial arrangement was not effective, constitutes a violation of its duty regarding the mandatory interactive process.

Given MHA's failure to engage in the interactive process, liability is appropriate if a reasonable accommodation without undue hardship to the employer would otherwise have been possible. *See id.* at 1117. As we have already discussed, a leave of absence was a reasonable

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[16] As we have discussed, working at home is a reasonable accommodation when the essential functions of the position can be performed at home and a work-at-home arrangement would not cause an undue hardship for the employer. EEOC Enforcement Guidance on Reasonable Accommodation, at 7626. Although MHA may have violated the ADA by refusing her request for a work at home accommodation, we do not reach this issue because on appeal Humphrey argues only the failure to grant a leave of absence as a violation of the duty to accommodate.

accommodation for Humphrey's disability.[17] Ordinarily, whether an accommodation would pose an undue hardship on the employer is a factual question. Here, however, MHA has conceded that granting a leave of absence would not have posed an undue hardship. MHA had a policy of granting leaves to disabled employees, and admits that it would have given Humphrey a leave had she asked for one at any time before her termination. MHA's ultimate position, therefore, is simply that Humphrey is not entitled to a leave of absence because she failed to ask for one before she was fired. As we have explained, however, MHA was under a continuing duty to offer a reasonable accommodation. Accordingly, we hold as a matter of law (again, assuming that Humphrey is a qualified individual with a disability) that MHA violated the ADA's reasonable accommodation requirement.

C. REASON FOR TERMINATION

Unlike a simple failure to accommodate claim, an unlawful discharge claim requires a showing that the employer terminated the employee because of his disability. *See Cooper v. Neiman Marcus Group*, 125 F.3d 786, 790 (1997). Often the two claims, are, from a practical standpoint, the same. For the consequence of the failure to accommodate is, as here, frequently an unlawful termination. In this case, MHA's stated reason for Humphrey's termination was absenteeism and tardiness. For purposes of

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[17] *See* Section IIA *supra*.

the ADA, with a few exceptions,[18] conduct resulting from a disability is considered to be part of the disability, rather than a separate basis for termination. *See Hartog v. Wasatch Academy*, 129 F.3d 1076, 1086 (10th Cir.1997). The link between the disability and termination is particularly strong where it is the employer's failure to reasonably accommodate a known disability that leads to discharge for performance inadequacies resulting from that disability. *See Borkowski v. Valley Central Sch. Dist.*, 63 F.3d 131, 143 (2d Cir.1995). In *Kimbro*, for example, we found that there was a sufficient causal connection between the employee's disability and termination where the employee was

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[18] The text of the ADA authorizes discharges for misconduct or inadequate performance that may be caused by a "disability" in only one category of cases-alcoholism and illegal drug use: "[An employer] may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee." 42 U.S.C. § 12114(c)(4). In line with this provision, we have applied a distinction between disability-caused conduct and disability itself as a cause for termination only in cases involving illegal drug use or alcoholism. *See Newland v. Dalton*, 81 F.3d 904, 906 (9th Cir.1996) (holding that an employer may fire an employee who went on a "drunken rampage" and attempted to fire an assault rifle at individuals in a bar); *Collings v. Longview Fibre Co.*, 63 F.3d 828, 832 (9th Cir.), *cert. denied*, 516 U.S. 1048, 116 S.Ct. 711, 133 L.Ed.2d 666 (1996) (employees discharged for drug-related misconduct at the workplace); *see also Hartog*, 129 F.3d at 1085-88 (reviewing cases in all circuits and finding that "the disability vs. disability-caused conduct dichotomy seems to be unique to alcoholism and drugs."). In *Newland*, however, we suggested that an additional exception might apply in the case of "egregious and criminal conduct" regardless of whether the disability is alcohol- or drug-related. *See Newland*, 81 F.3d at 906 ("Attempting to fire a weapon at individuals is the kind of egregious and criminal conduct which employees are responsible for regardless of any disability."). Any such exception would not be applicable to Humphrey's absences or tardiness.

discharged for excessive absenteeism caused by migraine-related absences. *See Kimbro*, 889 F.2d at 875. Similarly, Humphrey has presented sufficient evidence to create a triable issue of fact as to whether her attendance problems were caused by OCD. In sum, a jury could reasonably find the requisite causal link between a disability of OCD and Humphrey's absenteeism and conclude that MHA fired Humphrey because of her disability.

## III. CONCLUSION

For the foregoing reasons, the district court's grant of summary judgment to MHA on Humphrey's ADA and FEHA claims is hereby REVERSED and the case is REMANDED for proceedings consistent with this opinion.

## APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CV-F-96-6025 REC DLB

CAROLYN HUMPHREY,

*Plaintiff,*

v.

MEMORIAL HOSPITALS ASSOCIATION

*Defendant*

## ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(Terminates Documents 28, 29, 53, and 61)

I. Introduction

On November 24, 1997, this court heard Defendant Memorial Hospitals Association's (MHA) motion for summary judgment on Plaintiff's claims under the Americans with Disabilities Act (ADA), the California Fair Employment and Housing Act (FEHA), the Family and Medical Leave Act (FMLA), the California Family Rights Act (CFRA), and Plaintiff's claim for punitive damages. Because this court finds that MHA satisfied its duty to reasonably accommodate Humphrey's disability, this court grants Defendant's motion in its entirety.

II. Facts

Plaintiff Carolyn Humphrey worked at MHA as a medical transcriptionist from July, 1986, to her termination on October 10, 1995.

During 1987-1990, Plaintiff began to have problems with chronic tardiness and absenteeism. It is important that medical transcriptionists have few or no problems with tardiness or absenteeism, because their work is time-sensitive; timely completion of medical-transcription assignments is necessary for doctors to provide patients with quality care. Plaintiff was counseled in July of 1990 and 1991 for attendance and punctuality problems, but the problems continued. Often, when she failed to come in to work, she also failed to notify her supervisors that she would be absent. At all relevant times, Plaintiff knew that she had to call in if she was not going to come to work. Her failure to do so created scheduling problems at the MHA transcription department. Because of Plaintiff's repeated failure to notify MHA of her absences, the transcription department repeatedly failed to meet its deadlines and incurred additional overtime expense. Plaintiff received two official warnings about her behavior – a "Level I" warning in June of 1994, and a "Level III" warning in December of 1994. After the "Level III" warning, Plaintiff took advantage of the Employee Assistance Program (EAP) counseling that MHA offered. The counseling, however, did not help Plaintiff to change her behavior.

Plaintiff first began to believe that something was wrong with her after she watched a 1995 episode of the Oprah Winfrey show dealing with Attention Deficit Disorder (ADD). On May 3, 1995, Plaintiff met with MHA's Employee Health Nurse Practitioner, Elizabeth Pierson, to discuss Plaintiff's concern that her tardiness and absenteeism might be related to a medical condition such as ADD. Plaintiff expressed interest in a diagnostic psychiatric evaluation. The manager of the EAP set up an evaluation appointment with John J. Jacisin, M.D., a psychiatrist who practices at The Psychiatric Medical Group (PMG) in Modesto, California. Dr. Jacisin examined Plaintiff on May

12, 1995, and diagnosed her as suffering from Obsessive Compulsive Disorder (OCD).

OCD is a type of psychological disorder in which an individual experiences obsessions or compulsions or both. See DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 417 (American Psychiatric Association 4th ed. 1994). Obsessions are recurring or persistent thoughts, images, or impulses that, rather than being voluntarily produced, seem to invade a person's consciousness despite his attempts to ignore, suppress, or control them. See id. at 418. Compulsions are urges or impulses' to commit repetitive acts that are apparently meaningless, stereotyped, or ritualistic. See id.

Plaintiff has engaged in a variety of ritualistic behaviors. It is undisputed that Plaintiff's OCD caused Plaintiff's problems with lateness and absenteeism, and also caused her to repeatedly fail to call to tell the medical transcription department that she would be absent from or late to work. Defendant became aware of Plaintiff's OCD after Dr. Jacisin sent a letter on May 18, 1995, to Pierson discussing his diagnosis. The letter provides in relevant part:

> I believe we can treat this. Although, the treatment might take awhile [sic]. I do believe that she would qualify under the Americans with Disability [sic] Act although, I would like to see her continue to work, but if it is proving to be a major personnel problem, she may have to take some time off until we can get the symptoms under control.

On June 7, 1995, Plaintiff met with Pierson and Carol Evans-Bowlsby, Defendant's Medical Transcriptions Supervisor, to review Dr. Jacisin's letter. Plaintiff understood during this meeting that she had the option of taking some time off, but indicated that she did not wish to take time off. Pierson told Plaintiff at this meeting that Defendant could accommodate Plaintiff's disability. The

three discussed various accommodations, but settled on a flexible-start-time schedule. The schedule allowed Plaintiff to begin work anytime within a 24-hour period on days on which Plaintiff was scheduled to begin work. Defendant continued to expect that if Plaintiff was unable to arrive for work at all, she would contact someone in her supervisory chain within the medical-transcription department. Despite the flexible-start-time arrangement, Plaintiff continued to fail to report for work and continued to fail to inform her supervisor that she would be unable to report for work. Each of Plaintiff's unscheduled absences caused a complete 24-hour period of productivity to be lost and caused deadlines to be missed because the medical-transcription department did not know until the 24-hour period expired that Plaintiff definitely would not report that day for work. Plaintiff never contacted Pierson or anyone else at MHA to request a leave of absence or to seek any additional accommodation of her OCD until Plaintiff sent an electronic mail message, dated September 18, 1995, to Pierson. In that message, Plaintiff stated that she would be able to work more hours and be more productive if she were allowed to work at home. MHA denied her request, because under its "at-home" policy, employees who have been subject to discipline within the previous 12 months are ineligible for "at home" transcriptionist positions. Plaintiff had apparently discussed the possibility of at-home work with Dr. Jacisin on one occasion. Dr. Jacisin wrote to Plaintiff's then-attorney, Solange Altman:

> In respect to the issue about working at home, I expressed to you that this would probably only support her obsessive compulsive symptoms, and would be antitherapeutic. It might accommodate some of her work issues, but I would not say that she would just continue with her ritualistic behavior and never accomplish what she was supposed to accomplish at home, either.

Dr. Jacisin later testified in his deposition that he was reconsidering his earlier feelings about at-home work, because he felt it was necessary for Plaintiff to earn income and increase her confidence.

Plaintiff received a performance review on September 26, 1995. At that review, Plaintiff was told that she had been absent nine times within the previous two months without calling in. Her supervisor, Julie Vieira, told her that this was "unacceptable." Following this performance evaluation, she had two more occurrences of "no-shows." Plaintiff was terminated on October 10, 1995, based on her history of tardiness and absenteeism, her continued failure to communicate with anyone at MHA regarding her inability to report for work, and the disruption to MHA's operations caused by Plaintiff's actions.

Several minutes after she was terminated, Plaintiff asked Pierson for a medical leave of absence. Pierson refused, saying, according to Plaintiff, that Plaintiff had had her "one chance" at accommodation. But, MHA admits that if Plaintiff had requested a leave of absence at any time before her termination, MHA would have granted her request. MHA has a policy of giving unlimited medical leaves of absence for occupationally related disabilities and six-month leaves for non-occupational disabilities. MHA in the past has given medical leaves to employees of up to two years duration.

Plaintiff never requested leave under the Family Medical Leave Act or the California Family Rights Act.

Plaintiff's OCD has never caused her to be admitted to any psychological facility, or to be hospitalized.

III. Analysis

A. Summary-Judgment Standard

Initially, it is the moving party's burden to establish that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see British Airways Board v. Boeing Co., 585 F.2d 946, 950-951 (9th Cir. 1978). Where the moving party does not have the burden of proof on an issue at trial, it may meet that burden by showing that there is an absence of evidence to support the non-moving party's case. See Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the moving party meets its initial burden, a non-moving party must go beyond the pleadings and by its own affidavits, depositions, answers to interrogatories, and admissions on file, come forth with specific facts to show that a genuine issue of material fact exists and that a reasonable jury could return a verdict for the non-moving party. See Reynolds v. County of San Diego, 84 F.3d 1162, 1166 (9th Cir. 1996), overruled on other grounds by Acri v. Varian Assoc., Inc., 114 F.3d 999 (9th Cir. 1997) (en banc). In considering a motion for summary judgment, the court must examine all of the evidence in the light most favorable to the non-moving party. See id. The court must leave credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts to the jury. See id.

B. ADA/FEHA Claims[1]

In order to prevail on an employment-discrimination claim under the ADA, Plaintiff must establish: (1) that she is a disabled person within the meaning of the ADA; (2) that she is qualified, that is, with or without reasonable accommodation (which she must describe), she is able to perform the essential functions of the job; and (3) that MHA terminated her because of her disability. See Kennedy v. Applause, Inc., 90 F.3d 1477, 1481 (9th Cir. 1996). Although Defendant made many arguments challenging Plaintiff's ability to satisfy each element of the Kennedy test, the court feels that the matter may be resolved with a discussion of whether Defendant "reasonably accommodated" Plaintiff as a matter of law. The court finds that Defendant did so, and grants summary judgment on that ground.

Plaintiff's argument on the subject is as follows. Defendant failed to accommodate her disability by failing to offer her a medical leave of absence when it became clear that the flexible-start-time schedule was not working, and by failing to allow her to work at home.

The issue of "reasonable accommodation" in this case can be restated as two issues: (1) whether a prolonged medical leave of absence or permission to work at home are appropriate "reasonable accommodations" for an illness which causes an ADA plaintiff to sporadically miss work; and (2) if so, whether Plaintiff introduced sufficient evidence

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[1] Because the FEHA provisions relating to disability discrimination are based on the ADA and other federal law, decisions interpreting federal anti-discrimination laws are relevant in interpreting the FEHA's similar provisions. See Brundage v. Hahn, 57 Cal. App. 4th 228, 235 (1997). It is therefore proper to analyze Plaintiff's state and federal disability claims together, relying on federal authority in the absence of contrary controlling state law. See id.

to create a genuine dispute of material fact as to whether Defendant, by not giving Plaintiff a leave of absence before termination and by not allowing her to work at home, did not sufficiently engage in the interactive process that the ADA contemplates. The court now turns to these issues.

The Ninth Circuit's decision in Kimbro v. Atlantic Richfield Co. (ARCO), 889 F.2d 869 (9th Cir. 1989), quite clearly provides that a prolonged leave of absence is an appropriate, reasonable accommodation for an illness which causes a plaintiff to sporadically miss work. In Kimbro, the plaintiff was a machinist at an oil refinery who suffered from "cluster migraine," a condition characterized by sporadic and debilitating episodes of migraine headaches. In 1981, the condition caused plaintiff to be tardy a number of times and to incur several absences. ARCO discharged him for excessive absenteeism. Plaintiff sued under the Washington State handicap laws[2]. Plaintiff argued that ARCO could have reasonably accommodated him by, among other things, granting him a leave of absence. The Ninth Circuit held that ARCO should have offered plaintiff a leave of absence, remarking:

> Here, [plaintiff's] cluster migraine condition during the relevant period was characterized by acute periods of migraines lasting no longer than a few months, followed by long periods of relative remission in which [plaintiff] would only experience occasional migraines. Thus, it was clearly plausible that a leave of absence in 1981 would have provided [plaintiff] with an opportunity to endure the 1981 acute episode and then return to work unimpaired for

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[2] Washington State handicap laws are similar to the ADA and the FEHA. See Schmidt v. Safeway, Inc., 864 F. Supp. 991, 996 (D. Or. 1994); Prilliman v. United Air Lines, Inc., 53 Cal. App. 4th 935, 949 n.3 (1997).

> the foreseeable future. Moreover, at the time of his discharge, it was also plausible that a prolonged leave from work would have given [plaintiff] and his physicians an opportunity to design an effective treatment program. While it is altogether possible that [plaintiff's] migraine episodes may have recurred upon his return to work following a leave of absence, such a possibility does not foreclose a finding of liability for failure to accommodate Kimbro's migraines in 1981. As long as a reasonable accommodation available to the employer could have plausibly enabled a handicapped employee to adequately perform his job, an employer is liable for failing to attempt that accommodation. Accordingly, ARCO's failure to offer a leave of absence to [plaintiff] constitutes a violation of Washington's handicap discrimination law.
>
> Id. at 878-879.

Defendant also argues that an indefinite leave of absence is unreasonable as a matter of law, citing the following language in Myers v. Hose, 50 F.3d 278 (4th Cir. 1995):

> Nothing in the text of the reasonable accommodation provision requires an employer to wait an indefinite period for an accommodation to achieve its intended effect. Rather, reasonable accommodation is by its terms most logically construed as that which presently, or in the immediate future, enables the employee to perform the essential functions of the job in question.

Id. at 283. While it is true that an indefinite leave of absence in this case would likely be unreasonable as a matter of law, see Fuller v. Frank, 916 F.2d 558, 562 (9th Cir. 1990) (reasonable accommodation does not include duty to await uncertain results of alcoholic employee's treatment program), it is not true that all leaves of absence are

unreasonable. See Kimbro, supra. Defendant cannot prevail on this issue by casting it in absolute terms. Nothing prevented Defendant from granting Plaintiff a leave of absence with a specific time period. Indeed, Kimbro itself recognizes that if a leave of absence is offered and is unsuccessful, this will likely end an employer's duty to further accommodate a plaintiff. See Kimbro, 889 F.2d at 879 n.10[3].

Courts are split on whether "at-home" work is an appropriate reasonable accommodation for a disability that causes excessive absenteeism. The Seventh Circuit and the Fourth Circuit hold that an employer is generally not required to accommodate a disability by allowing the disabled worker to work, by herself, without supervision, at home. See Vande Zande v. State of Wis. Dept. of Admin., 44 F.3d 538, 544-545 (7th Cir. 1995); Tyndall v. Nat'l Education Centers, Inc., 31 F.3d 209, 213-214 (4th Cir. 1994). The District of Columbia Circuit disagrees. See Langon v. Dept. of Health & Human Services, 959 F.2d 1053, 1060-1061 (D.C. Cir. 1992); see also Norris v. Allied-Sysco Food Services, Inc., 948 F. Supp. 1418, 1431-1432 (N.D. Cal. 1996) (at-home work could be reasonable accommodation in some circumstances).

This court has considered the issue, and holds that at-home work could be a reasonable accommodation in certain limited circumstances, but not in this case. Plaintiff's job is certainly capable of being performed at home, as evidenced by the fact that MHA had several at-home positions for medical transcriptionists. However, this court notes the

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[3] Under the ADA, a defendant does not have to provide an accommodation if it would result in an "undue hardship" to the defendant. See 42 U.S.C. § 12112(b)(5)(A). Defendant has not argued that giving Plaintiff a leave of absence would impose an "undue hardship."

time-sensitive nature of Plaintiff's work, and Plaintiff's difficulty in completing it, even with a 24-hour flexible start time, and finds that it cannot expect MHA in this case to allow Plaintiff to work at-home without some compelling evidence that such an accommodation would enable her to timely complete her work. The evidence before the court demonstrates that her psychiatrist believed that at-home work would be "anti-therapeutic," and would probably only "support her obsessive-compulsive" symptoms. While it is true that Dr. Jacisin distanced himself somewhat from this initial conclusion in later deposition testimony, a review of the testimony demonstrates that at the time, he believed only that at-home work would be worth trying, as a last resort. This is not the compelling evidence that the court would need to hold that at-home work in this case was a reasonable accommodation that MHA was required to try.

The second issue is whether Defendant sufficiently engaged in the contemplated interactive process with regard to the medical leave of absence. When deciding whether an employer has reasonably accommodated an employee, courts note that the ADA contemplates an interactive process between employer and employee where both parties bear responsibility for determining what accommodation is necessary. See 29 C.F.R. § 1630.2(o)(3); Bultemeyer v. Fort Wayne Community Schools, 100 F.3d 1281, 1285 (7th Cir. 1996). Courts look for signs of a failure to participate in good faith, or failure by one of the parties to help the other party determine what specific accommodations are necessary. See Bultemeyer, 100 F.3d at 1285. A party that fails to communicate, by way of initiation or response, may also be acting in bad faith. See id. In essence, courts attempt to isolate the cause of the breakdown, and then assign responsibility. See id.

In a case involving an employee with mental illness, the communication process becomes more difficult. See id. It is

crucial that the employer be aware of the difficulties, and help the other party determine what specific accommodations are necessary. See id.

Some cases appear to put a greater burden on the employer than the employee, if not to suggest that an accommodation is necessary, then to investigate the employee's condition and to determine what accommodation might be most appropriate for that employee. To properly demonstrate this proposition, the court explores several relevant cases.

In Bultemeyer, supra, a school janitor with bipolar disorder and paranoid schizophrenia went on a series of disability leaves and then told his supervisor that he was ready to return to work. His supervisor told him that he would have to take a physical, and work at one of the largest high schools in the system. The janitor did not think himself equal to the task, and so did not take the physical and did not report for work when he was supposed to. His psychiatrist wrote a letter to his supervisor, stating that it would be in the janitor's best interest if he worked at a "less stressful school." The trial court granted summary judgment to the school district on the janitor's ADA claims. The Seventh Circuit reversed. It found that the school district should have discussed the letter with the janitor and his psychiatrist to try to discover why the position was more stressful, and to sit down with the janitor to discuss what sort of accommodation he might need. See Bultemeyer, 100 F.3d at 1284-1286; see also Mantolete v. Bolger, 767 F.2d 1416, 1423 (9th Cir. 1985) ("Thus an employer has a duty under the Act to gather sufficient information from the applicant and from qualified experts as needed to determine what accommodations are necessary . . .").

Also demonstrating this proposition is Prilliman v. United Air Lines, Inc., 53 Cal. App. 4th 935 (1997). In Prilliman, United Air Lines, Inc. placed pilot Prilliman on

permanent paid disability leave. Prilliman brought an action under the FEHA. United argued that the act of putting Prilliman on leave was itself a reasonable accommodation, and thereafter the burden was on Prilliman to identify a different accommodation. The court rejected this argument, stating:

> We also find without merit respondents' suggestion that the disabled employee must first come forward and request a specific accommodation before the employer has a duty to investigate such accommodation. In other words, respondents maintain that they reasonably accommodated Prilliman by offering him insured disability leave, and they had no duty to investigate other possible accommodations, such as alternative job positions with United, because Prilliman did not request an alternative position.

Id. at 954.

Of course, as the Defendant correctly points out, the burden does not rest solely on the employer; in some cases the employee may be responsible for a communication breakdown. This court reviewed a substantial number of "reasonable accommodation" cases, and concludes from those cases that a court may properly grant summary judgment in favor of an ADA defendant where the defendant makes a serious offer to accommodate a plaintiff's disability, and plaintiff rejects the offer.

For example, in Hankins v. The Gap, Inc., 84 F.3d 797 (6th Cir. 1996), the Sixth Circuit upheld the trial court's grant of summary judgment in favor of an employer, because the employee knew of a company leave policy, but failed to request it. The court made the following observation:

> While it is true that an employer should normally advise an employee of available accommodations

> once the employee informs the employer that an accommodation is needed, it is equally true that an employer has no duty to reiterate self-evident options to an employee when she is clearly aware of them. In this case . . . there is certainly no dispute over whether she knew about accommodations that already existed. She admits she knew about the availability of paid and unpaid medical leave . . . . Given the apparentness of available accommodations, plaintiff's contention that she needed to be told explicitly about them is singularly unconvincing. In summary, we hold that plaintiff's refusal to accept available reasonable accommodations precludes her from arguing that other accommodations should also have been provided.

Id. at 801-802.

Similarly, in DeBord v. Board of Education, 126 F.3d 1102 (8th Cir. 1997), the Eighth Circuit upheld a trial court's grant of summary judgment in favor of a school. In DeBord, the school refused to administer an eight-year-old student's Attention Deficit Hyperactivity Disorder prescription, because to do so would conflict with the school's policy not to administer prescription drugs to students in excess of the recommended daily dosage. The school offered as an accommodation to the parties either an alteration of the student's class schedule or permission for the parents or someone designated by the parents to administer the drug at school. The parents rejected these accommodations and sued. The Eighth Circuit held that the school had provided reasonable accommodations as a matter of law. See id. at 1106.

Finally, in Schmidt v. Methodist Hosp., 89 F.3d 342 (7th Cir. 1996), the Seventh Circuit upheld a trial court's grant of summary judgment in favor of defendant employer-hospital.

In Schmidt, a nurse with a severe hearing disability claimed that a hospital had failed to reasonably accommodate him by refusing to transfer him to a different nursing unit, where he would not have to distinguish between so many different alarms. The hospital gave him two options: he could receive extra training where he was or he could resign and apply to a different position. According to the Seventh Circuit, this was enough to satisfy the employer's "reasonable accommodation" duty. See id. at 344-345.

Given the above principles, this court now sets forth that part of the factual record that deals with the "interactive process" between Plaintiff and Defendant and examines it to determine whether Plaintiff has introduced evidence sufficient to support a finding that Defendant did not appropriately engage in the process. Upon examination, the court finds that Defendant participated in the interactive process, and that the blame of the breakdown in communications is more properly placed on Plaintiff.

The process began after Dr. Jacisin had diagnosed Plaintiff with OCD. On May 26, 1995, Elizabeth Pierson, Defendant's Employee Health Nurse Practitioner, received Dr. Jacisin's letter containing his diagnosis of Plaintiff. The letter stated in relevant part:

> I believe we can treat this. Although, the treatment may take awhile [sic]. I do believe that she would qualify under the Americans with Disability [sic] Act although, I would like to see her continue to work, but if it is proving to be a major personnel problem, she may have to take some time off until we can get the symptoms under control.

The parties vigorously argue whether this letter can be construed as a recommendation for a leave of absence. Dr. Jacisin testified in his deposition that he considered it to be so:

Q: So you did have an opinion in 1985 -- May 18th, 1985 about what -- withdrawn. You told memorial in May of 1985 that this -- Mrs. Humphrey might have to take time off from work at some point, correct?

MR. CURRAN [Defendant's counsel]: Objection, leading, and you're misspeaking. You're saying '85.

MR. BUDIN [Plaintiff's counsel]: 1995, okay. I'll rephrase the question. On May 18th, 1995 you told Memorial through Ms. Pierson that Mrs. Humphrey might have to take time off from work, right?

MR. CURRAN: Objection, leading.

THE WITNESS: If they could not accommodate her lateness.

MR. BUDIN: And by time off from work, you were thinking of a leave of absence, correct?

MR. CURRAN: Same objection.

THE WITNESS: Yes.

MR. BUDIN: I'm only getting back to 'cause he asked you some very broad questions about whether you had any opinions about accommodation in 1995 when you first saw her. And you said no, but this letter seems to indicate that you were telling Memorial of at least two possibilities, one either accommodate her lateness or two, give her time off from work to get her symptoms under control, correct?

A: Yes.

MR. CURRAN: Objection, leading and the document speaks for itself. . . .

Deposition of Dr. Jacisin at 96:9 - 97:13.

On June 7, 1995, Pierson and Carol Evans-Bowlsby, the Medical Transcriptions supervisor, met with Plaintiff to go over what Dr. Jacisin had said in the letter. According to Defendant, Plaintiff stated at that meeting that she did not want a leave of absence, and that she preferred to continue working. See Declaration of Elizabeth Pierson at ¶ 10. Plaintiff's account of the meeting is as follows:

> Q: . . . Let me ask you to, let me ask you about the June 7, 1995 meeting with Evans and Pierson. This was after your examination by Dr. Jacisin. Exhibit 12 on page 6 indicates that both you and Evans agree that you didn't think you needed a leave of absence.
>
> A: I don't remember being asked if I thought I needed one. They asked if I would like to keep working. And I said yes. I remember that.
>
> Q: Was the issue of a leave of absence raised in any way during the June 7, 1995 meeting?
>
> A: I guess they asked if I wanted to keep working. I guess maybe it was then. And I said, yes, I wanted to keep working if possible.
>
> Q: Did anyone use the actual phrase "leave of absence"?
>
> A: I don't remember. I don't feel like I was offered a leave of absence.
>
> Q: Well, you were asked whether you wanted to keep working, right?
>
> A: If I felt, yeah.
>
> Q: Did you understand from that question that you had the option of saying no and taking some time off?
>
> A: I guess. I don't know. I don't remember. I don't remember them coming right out and saying

> do you feel like you need a leave of absence or do you want to keep working. I didn't, they didn't tell me it was possible. I mean, they didn't out and out offer it to me and I did want to keep working and I felt that I could.
>
> Q: . . . During that meeting you were asked if you wanted to keep working, right?
>
> A: I think so, yes.
>
> Q: Were you under the impression during that meeting that if you had said you did not want to keep working you'd get fired or suffer some other adverse consequence?
>
> A: No.
>
> Q: So you understood that you had the option of not working, did you not?
>
> A: I guess so. But I didn't feel like I needed it then, so --

Deposition of Carolyn Humphrey at 271:9 - 272:20. The court believes that Plaintiff can raise no genuine issue of material fact as to whether Defendant offered Plaintiff a leave of absence after she was diagnosed with OCD. Plaintiff's own deposition testimony makes it clear that Defendant did.

Also at this June 7, 1995 meeting, Pierson informed Plaintiff that she could have an accommodation that would enable her to keep working. Pierson discussed the following with Plaintiff: (1) that Plaintiff's request for accommodation would be evaluated to determine whether or not MHA could reasonably provide it; (2) whether or not a family member or friend could drive Plaintiff to the job site and thereby assist her with reporting timely to work; or (3) whether she would prefer a flexible start time, i.e., allowing Plaintiff to begin work anytime within a 24-hour period on days on which

Plaintiff was scheduled to begin work. Plaintiff responded that the flexible start-time accommodation would be good for her, and later submitted her request in writing. Defendant agreed to the accommodation[4].

Despite the flexible-start-time arrangement, Plaintiff continued to fail to report for work or to call in to inform her supervisor that she would be unable to report for work. Defendant asserts that on August 30, 1995, Julie Vieira, Manager of the Medical Records and Transcription Department at MHA, spoke with Plaintiff about her continuing problems. According to Defendant, Plaintiff did not request a leave of absence, or any other accommodation at that time.

In any case, neither Plaintiff nor Defendant brought up the idea of a leave of absence or any other accommodation until September 18, 1995[5], when Plaintiff sent an e-mail to Pierson requesting that she be allowed to work at home. Pierson discussed Plaintiff's idea with Vieira, and responded with the following e-mail:

> CAROLYN – I met with Diane Michaud, Employment Specialist Human Resources, and Julie Vieira, your manager, to discuss [your "at-home"

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[4] " Plaintiff claims that Pierson knew that a flexible starting time would not be successful because she wrote to Dr. Jacisin on May 11, 1995, that a flexible starting time had already been tried and had failed. This is an accurate, but somewhat misleading statement. In her letter, Pierson states that Plaintiff had not been able to maintain a flexible start time which allowed her to come in up to four hours late.

[5] Plaintiff has submitted a declaration in which she states that she did not request a leave of absence at any time because she believed that Defendant already had Dr. Jacisin's recommendation that she be given a leave of absence. Plaintiff allegedly believed that Defendant would offer her a leave of absence before firing her because Dr. Jacisin told Defendant to do that.

request]. It is departmental policy that if you are involved in any disciplinary action you are ineligible to be a home based transcriptionist as per the AT HOME AGREEMENT FOR TRANSCRIPTIONISTS. Since you are currently involved in the discipline process, you are ineligible for being based at home. During our 6/7/95 meeting, you requested to be accommodated for your disability by having a flexible start time, stating that you would have no problems staying for a full shift once you arrived. You were given this flexible start time accommodation which continues to remain in effect. As for your productivity, your manager indicated that you consistently meet your hourly productivity requirements when you are at work. Please contact me if I can be of further assistance. Liz Pierson 9/21/95.

Vieira allegedly told Pierson that no funding was available for "at-home" work and that Plaintiff's discipline record made her ineligible for "at-home" work. Plaintiff asserts that Pierson told her about the disciplinary reasons for the refusal, but never said anything about a lack of funding. According to Plaintiff, Vieira also never mentioned the lack of funding at Plaintiff's September 26, 1995 performance evaluation. See Deposition of Carolyn Humphrey at 258:23 - 261:6.

On September 26, 1995, Vieira gave Plaintiff her performance review, which included a final warning about Plaintiff's "no-show" days. Defendant asserts that Plaintiff never discussed her need for an accommodation with Vieira at that time. Plaintiff disputes this, stating in her deposition that she brought up the "at-home" position with Vieira, but got the same explanation as before, that her disciplinary problems prevented it. Plaintiff also stated in her deposition

that Vieira was "rigid," "hard to talk to" and that Vieira treated the at-home work option as a "closed issue."

Between her September 26, 1995 review and her October 10, 1995 termination, Plaintiff had no conversations with any manager about her disability or about accommodation. During this time period, Plaintiff had two more "no-show" days. Vieira and Diane Michaud, Defendant's Employee Relations Specialist, then made the decision to terminate Plaintiff.

Plaintiff was terminated on October 10, 1995. After Plaintiff received notice, she went to Pierson and asked for a medical leave of absence. According to Plaintiff, Pierson told her that Plaintiff had had her "one chance" at accommodation. See Deposition of Carolyn Humphrey at 282:11 - 283:3[6].

The court notes that whether to grant summary judgment in this case is a close question, but finds that it must place the blame for the breakdown in the interactive process with Plaintiff. The court finds dispositive the facts that Plaintiff was initially offered a leave of absence and rejected it, and then failed to request a leave of absence subsequently. This court therefore holds that it must grant summary judgment in favor of Defendant on Plaintiff's ADA claim.

C. Plaintiff's Punitive-Damages Claim

The court grants summary judgment as to this claim, because it grants Defendants' summary-judgment motion on the underlying ADA violation.

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[6] Defendant objects to this statement as hearsay. This statement is not hearsay, but an admission by a party opponent. See Fed. R. Evid. 801(d)(2)(D).

D. Plaintiff's FMLA And CFRA Claims

The FMLA entitles eligible employees to a total of 12 work-weeks of leave during any 12-month period, when the employee has a "serious health condition that makes the employee unable to perform the functions of the position" of the employee. See 29 U.S.C. § 2612(a)(1)(D). A "serious health condition" is defined to mean "an illness, injury, impairment, or physical or mental condition that involves (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." 28 U.S.C. § 2611(11).

The CFRA, Cal. Gov't Code § 12945.2, prohibits an employer from refusing a request by any eligible employee to take up to a total of 12 workweeks in any 12-month period for family or medical leave. The CFRA defines "serious health condition" in the same way as does the FMLA. See Cal. Gov. Code § 12945.2(c)(8).

Plaintiff before her termination never requested leave of any kind. Moreover, Plaintiff never had a "serious health condition" as defined in either statute. Her OCD never caused her to be admitted to any psychological facility, or to be hospitalized. She took no regular health treatment between when she was diagnosed as suffering from OCD in May, 1995, and when she was terminated in October, 1995.

Therefore, because Plaintiff has failed to raise a genuine issue of fact on essential elements of her FMLA and CFRA claims, this court will grant MHA's motion for summary judgment as to those claims.

IV. Conclusion

For the foregoing reasons, IT IS ORDERED that Defendant's summary-judgment motion be GRANTED.

Dated: February 9, 1998

ROBERT E. COYLE
UNITED STATES DISTRICT JUDGE

## APPENDIX C

## STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the ADA are codified at 42 U.S.C. §§ 12111-12112 as follows:

### § 12111. Definitions

As used in this subchapter:

#### (1) Commission

The term "Commission" means the Equal Employment Opportunity Commission established by section 2000e-4 of this title.

#### (2) Covered entity

The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

#### (3) Direct threat

The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

#### (4) Employee

The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

#### (5) Employer

##### (A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or

preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

**(B) Exceptions**

The term "employer" does not include—

**(i)** the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

**(ii)** a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of title 26.

**(6) Illegal use of drugs**

**(A) In general**

The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act [21 U.S.C. 801 et seq.]. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

**(B) Drugs**

The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 U.S.C. 812].

**(7) Person, etc.**

The term "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 2000e of this title.

**(8) Qualified individual with a disability**

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purpose of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

**(9) Reasonable accommodation**

The term "reasonable accommodation" may include—

> **(A)** making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> **(B)** job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

**(10) Undue hardship**

**(A) In general**

The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

**(B) Factors to be considered**

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—

**(i)** the nature and cost of the accommodation needed under this chapter;

**(ii)** the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;

**(iii)** the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and

**(iv)** the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

## § 12112. Discrimination

### (a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges or employment.

### (b) Construction

As used in subsection (a) of this section, the term "discriminate" includes—

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration—

(A) that have the effect of discrimination on the basis of disability; or

(B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or

whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

**(c) Covered entities in foreign countries**

**(1) In general**

It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

**(2) Control of corporation**

**(A) Presumption**

If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer.

**(B) Exception**

This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer.

**(C) Determination**

For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on—

(i) the interrelation of operations;

(ii) the common management;

(iii) the centralized control of labor relations; and

(iv) the common ownership or financial control, of the employer and the corporation.

**(d) Medical examinations and inquiries**

**(1) In general**

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

**(2) Preemployment**

**(A) Prohibited examination or inquiry**

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

**(B) Acceptable inquiry**

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

**(3) Employment entrance examination**

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if—

(A) all entering employees are subjected to such an examination regardless of disability;

**(B)** information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that—

**(i)** supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations:

**(ii)** first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

**(iii)** government officials investigating compliance with this Act shall be provided relevant information on request; and

**(C)** the results of such examination are used only in accordance with this title.

**(4) Examination and inquiry**

**(A) Prohibited examination and inquiries**

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

**(B) Acceptable examination and inquiries**

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered

entity may make inquiries into the ability of an employee to perform job-related functions.

**(C) Requirement**

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirement of subparagraphs (B) and (C) of paragraph (3).

## APPENDIX D

## RELEVANT PORTIONS OF [29 C.F.R.] PART 1630—REGULATIONS TO IMPLEMENT THE EQUAL EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT

### § 1630.2 Definitions

. . . .

(o) *Reasonable accommodation.*

. . . .

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

### § 1630.9 Not making reasonable accommodation.

. . . .

(d) A qualified individual with a disability is not required to accept an accommodation, aid, service, opportunity or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service, opportunity or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified individual with a disability.

## APPENDIX TO PART 1630—INTERPRETIVE GUIDANCE ON TITLE I OF THE AMERICANS WITH DISABILITIES ACT

### Section 1630.2(o) Reasonable Accommodation

. . . .

Part 1630 lists the examples, specified in title I of the ADA, of the most common types of accommodation that an employer or other covered entity may be required to provide. There are any number of other specific accommodations that may be appropriate for particular situations but are not specifically mentioned in this listing. This listing is not intended to be exhaustive of accommodation possibilities. For example, other accommodations could include permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment, making employer provided transportation accessible, and providing reserved parking spaces. Providing personal assistants, such as a page turner for an employee with no hands or a travel attendant to act as a sighted guide to assist a blind employee on occasional business trips, may also be a reasonable accommodation. Senate Report at 31; House Labor Report at 62; House Judiciary Report at 39.

### *Section 1630.9 Not Making Reasonable Accommodation*

. . . .

### Process of Determining the Appropriate Reasonable Accommodation

Once a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation. The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the

qualified individual with a disability. Although this process is described below in terms of accommodations that enable the individual with a disability to perform the essential functions of the position held or desired, it is equally applicable to accommodations involving the job application process, and to accommodations that enable the individual with a disability to enjoy equal benefits and privileges of employment. See Senate Report at 34-35; House Labor Report at 65-67.

When a qualified individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer, using a problem solving approach, should:

(1) Analyze the particular job involved and determine its purpose and essential functions;

(2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation;

(3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and

(4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer.

In many instances, the appropriate reasonable accommodation may be so obvious to either or both the employer and the qualified individual with a disability that it may not be necessary to proceed in this step-by-step fashion. For example, if an employee who uses a wheelchair requests that his or her desk be placed on blocks to elevate the

desktop above the arms of the wheelchair and the employer complies, an appropriate accommodation has been requested, identified, and provided without either the employee or employer being aware of having engaged in any sort of "reasonable accommodation process."

However, in some instances neither the individual requesting the accommodation nor the employer can readily identify the appropriate accommodation. For example, the individual needing the accommodation may not know enough about the equipment used by the employer or the exact nature of the work site to suggest an appropriate accommodation. Likewise, the employer may not know enough about the individual's disability or the limitations that disability would impose on the performance of the job to suggest an appropriate accommodation. Under such circumstances, it may be necessary for the employer to initiate a more defined problem solving process, such as the step-by-step process described above, as part of its reasonable effort to identify the appropriate reasonable accommodation.

This process requires the individual assessment of both the particular job at issue, and the specific physical or mental limitations of the particular individual in need of reasonable accommodation. With regard to assessment of the job, "individual assessment" means analyzing the actual job duties and determining the true purpose or object of the job. Such an assessment is necessary to ascertain which job functions are the essential functions that an accommodation must enable an individual with a disability to perform.

After assessing the relevant job, the employer, in consultation with the individual requesting the accommodation, should make an assessment of the specific limitations imposed by the disability on the individual's performance of the job's essential functions. This assessment will make it possible to ascertain the precise

barrier to the employment opportunity which, in turn, will make it possible to determine the accommodation(s) that could alleviate or remove that barrier.

If consultation with the individual in need of the accommodation still does not reveal potential appropriate accommodations, then the employer, as part of this process, may find that technical assistance is helpful in determining how to accommodate the particular individual in the specific situation. Such assistance could be sought from the Commission, from State or local rehabilitation agencies, or from disability constituent organizations. It should be noted, however, that, as provided in § 1630.9(c) of this part, the failure to obtain or receive technical assistance from the Federal agencies that administer the ADA will not excuse the employer from its reasonable accommodation obligation.

Once potential accommodations have been identified, the employer should assess the effectiveness of each potential accommodation in assisting the individual in need of the accommodation in the performance of the essential functions of the position. If more than one of these accommodations will enable the individual to perform the essential functions or if the individual would prefer to provide his or her own accommodation, the preference of the individual with a disability should be given primary consideration. However, the employer providing the accommodation has the ultimate discretion to choose between effective accommodations, and may choose the less expensive accommodation or the accommodation that is easier for it to provide. It should also be noted that the individual's willingness to provide his or her own accommodation does not relieve the employer of the duty to provide the accommodation should the individual for any reason be unable or unwilling to continue to provide the accommodation.

# APPENDIX E

## EEOC: Guidance on Reasonable Accommodation Under the ADA

## OTHER REASONABLE ACCOMMODATION ISSUES[1]

31. If an employer has provided one reasonable accommodation, does it have to **provide additional reasonable accommodations** requested by an individual with a disability?

The duty to provide reasonable accommodation is an ongoing one.[2] Certain individuals require only one reasonable accommodation, while others may need more than one. Still others may need one reasonable accommodation for a period of time, and then at a later date, require another type of reasonable accommodation. If an individual requests multiple reasonable accommodations, s/he is entitled only to those accommodations that are necessitated by a disability and that will provide an equal employment opportunity.

An employer must consider each request for reasonable accommodation and determine: (1) whether the accommodation is needed, (2) if needed, whether the accommodation would be effective, and (3) if effective, whether providing the reasonable accommodation would impose an undue hardship. If a reasonable accommodation turns out to be ineffective and the employee with a disability remains unable to perform an essential function, the

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[1] The discussions and examples in this section assume that there is only one effective accommodation and that the reasonable accommodation will not cause an undue hardship.

[2] *See Ralph v. Lucent Technologies, Inc.*, 135 F.3d 166, 171, 7 AD Cas. (BNA) 1345, 1349 (1st Cir. 1998).

employer must consider whether there would be an alternative reasonable accommodation that would not pose an undue hardship. If there is no alternative accommodation, then the employer must attempt to reassign the employee to a vacant position for which s/he is qualified, unless to do so would cause an undue hardship.

Supreme Court, U.S.
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No. 00-1860

IN THE

# Supreme Court of the United States

MEMORIAL HOSPITALS ASSOCIATION,

*Petitioner,*

*v.*

CAROLYN HUMPHREY,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether, as the Ninth Circuit held below, an employer must offer a "reasonable accommodation" to an employee before terminating her employment even when the employee knows about and previously has rejected that reasonable accommodation, or, as other courts of appeals have held, an employer need not offer a reasonable accommodation to an employee when the employee knows about the "reasonable accommodation" and already has rejected it.

2. Whether, as the Ninth Circuit held below, an indefinite leave of absence that might "plausibly" allow an employee to return to work qualifies as a "reasonable accommodation," or as other courts of appeals have held, a leave of absence must be definite in duration and "likely" to enable the employee to return to work to qualify as a "reasonable accommodation."

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## STATEMENT OF THE CASE

Memorial Hospitals Association's ("MHA") Petition For Writ Of Certiorari should be denied for one simple reason: neither the record nor the decision below *raise* the two questions presented by the Petition.

In its first question presented, MHA claims that the Ninth Circuit held that ". . . an employer must offer an employee an accommodation that is known to the employee and that she previously has rejected". *See* Pet. at 2. The Ninth Circuit neither announced such a generic holding nor ever ruled on such an issue — on the contrary, the case below was about the breakdown of the ADA-mandated interactive process and assigning responsibility therefor. In considering that issue, the Ninth Circuit[1] simply held that, under the facts of the case, MHA had violated its "continuing duty" to engage in the interactive process in an effort to find an effective accommodation, *i.e.*, an accommodation that works. *See Humphrey v. Memorial Hospitals Ass.* ("*Humphrey*"), Pet., App. A at 18a ["We conclude, as a matter of law, that . . . MHA had an affirmative duty under the ADA to explore further methods of accommodation before terminating Humphrey"].

The second question presented by MHA is "whether an indefinite leave of absence that might 'plausibly' allow an employee to return to work qualifies as a reasonable accommodation". *See* Pet. at 3. However, the Ninth Circuit

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1. The Ninth Circuit decision below was an *unanimous* opinion, authored by Judge Stephen Reinhardt and joined by Judge Thomas G. Nelson and Phyllis A. Kravitch (Senior Judge, United States Court of Appeals for the Eleventh Circuit, sitting by designation).

never considered the issue of the *length* of a leave of absence. Although MHA repeatedly refers to the Ninth Circuit's purported approval of an indefinite leave of absence, MHA never cites the exact portion of the appellate opinion which contains this holding. The reason MHA does not is because it cannot. The decision below is not about a *request* for an indefinite leave of absence, but about MHA's failure to engage in the interactive process toward the end of implementing a reasonable and effective accommodation. *See Humphrey*, Pet., App. A at 21a:

> Similarly, MHA's rejection of Humphrey's work-at-home request and its failure to explore with Humphrey the possibility of other accommodations, once it was aware that the initial arrangement was not effective, constitutes a violation of its duty regarding the mandatory interactive process.

In other words, the Ninth Circuit never had to reach the issue of the *length* of the leave of absence because MHA terminated Humphrey's employment before ever exploring that possibility with her.

Given that MHA has raised two hypothetical questions, devoid of any factual or legal connection to the decision below, its attempt to cast the Ninth Circuit decision as in conflict with other Circuits falls of its own weight. In holding that MHA, on the facts of this case, had a continuing duty to engage in the interactive process to find an effective and reasonable accommodation *after* the first attempt failed, the Ninth Circuit has both aligned itself with the other Circuits which have addressed this issue and has issued a ruling which is consistent with the letter and spirit of the ADA. *See Ralph v. Lucent Technologies*, 135 F.3d 166, 172 (1st Cir. 1998)

("The duty to provide reasonable accommodation is a continuing one . . . not exhausted by one effort"); *Bultmeyer v. Fort Wayne Community School*, 100 F.3d 1281, 1285 (7th Cir. 1996); *Cehrs v. Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775, 784 (6th Cir. 1998); EEOC: Guidance on Reasonable Accommodation Under the ADA, Pet., App. E at 63a-64a ("If a reasonable accommodation turns out to be ineffective . . . the employer must consider . . . an alternative reasonable accommodation"). The Ninth Circuit decision breaks no new legal ground nor raises any important question of federal law that needs to be addressed by this Supreme Court. The Ninth Circuit decision is a *fact-bound* case which simply applied existing principles of ADA jurisprudence to the circumstances that enveloped MHA and Humphrey during the Summer and Fall of 1995. Because the case below *is* fact-intensive and MHA's Statement Of The Case omits important facts upon which the Ninth Circuit relied, Humphrey offers the following supplement to MHA's factual background.

## FACTUAL BACKGROUND

There are two critical events which are not accurately depicted in MHA's petition: (1) the June 7, 1995 meeting between Humphrey and MHA and (2) the September 21, 1995 e-mail from MHA to Humphrey which rejected Humphrey's request for a work-at-home accommodation.

The first critical event occurred when Humphrey and MHA's ADA coordinator (Pierson) met on June 7, 1995 to discuss Dr. Jacisin's letter and the issue of reasonable accommodation for Humphrey's disability. Contrary to the characterization in MHA's petition, the record below does *not* establish that MHA offered Humphrey a leave of absence

and she rejected it. As the Ninth Circuit noted in its opinion, "what happened at this meeting is disputed". *Humphrey*, Pet., App. A at 4a. What the record below does indicate is that MHA contends that there was a clear offer and firm rejection of a leave of absence. Humphrey, on the other hand, contends that there was never an offer and rejection; but, rather, an open-ended discussion, the thrust of which was that she wanted to continue to work if at all possible. Accordingly, the June 7 discussion focused on accommodations that might accomplish that goal.

The second critical point occurred at the end of September, 1995, when Humphrey, upset about her continuing attendance problems, sent an e-mail message to MHA's ADA coordinator (Pierson) asking for a new accommodation because the flexible start-time was not working. Pierson responded by e-mail on September 21, 1995. She denied Humphrey's request for a work-at-home position and failed to suggest any alternative accommodation or any further discussions:

> It is departmental policy that if you are involved in any disciplinary action you are ineligible to be a home based transcriptionist as per the AT HOME ARRANGEMENT FOR TRANSCRIPTIONISTS. Since you are currently involved in the discipline process, you are ineligible for being based at home. During our 6/7/95 meeting, you requested to be accommodated for your disability by having a flexible start time, stating that you would have no problems staying for a full shift once you arrived. You were given this flexible start time accommodation which continues to remain in effect. As for your

> productivity, your manager indicated that you consistently meet your hourly productivity requirements when you are at work.

Pierson never attempted any further contact with Humphrey. Humphrey was fired approximately two and one-half weeks later.

As is shown below, these facts demonstrate that the Ninth Circuit decision is not about either: (1) the failure of an employer to offer an accommodation already offered and rejected (MHA's first question presented) or (2) a request for an indefinite leave of absence (MHA's second question presented). Rather, the Ninth Circuit decision revolves around the breakdown of the ADA-mandated interactive process.

## REASONS FOR DENYING THE WRIT

### I. MHA's First Question Mischaracterizes The Holding Of The Ninth Circuit

In a nutshell, MHA's argument in favor of granting the writ is as follows: First, MHA characterizes the Ninth Circuit opinion as holding that an employee, who finally and categorically rejects a reasonable accommodation, can later assert that the employer violated the ADA by failing to offer her that same accommodation. MHA then crafts its first question presented based on this characterization. *See* Pet. at 2. Finally, MHA attempts to create a conflict between the "purported" Ninth Circuit holding and decisions of other Circuits. *See Hankins v. The Gap, Inc.*, 84 F.3d 797 (6th Cir. 1996) and *Mole v. Buckhorn Rubber Products, Inc.*, 165 F.3d 1212 (8th Cir. 1999).

The logic of MHA's petition is fatally flawed because the premise of its argument is simply wrong. The Ninth Circuit did not issue the broad, per se rule embodied in MHA's first question. In fact, the Ninth Circuit decision did not involve a resolution of the dispute between Humphrey and MHA as to whether there was ever an offer and rejection of a leave of absence at the June 7 meeting. *See Humphrey*, Pet., App. A at 4a. The heart of the Ninth Circuit decision involved the breakdown of the ADA-mandated interactive process and the assignment of responsibility therefor. *See Humphrey*, Pet., App. A at 18a-22a: "BREAKDOWN OF THE INTERACTIVE PROCESS".

The facts in this case demonstrate that there was an initial interactive meeting between MHA and Humphrey on June 7 which produced a reasonable accommodation (flexible start-time). The accommodation was implemented, but failed. MHA knew that the accommodation was failing and, furthermore, Humphrey notified MHA of its failure and requested another accommodation (work-at-home) on September 18. MHA summarily denied her request on September 21 and never again engaged her in the interactive process before terminating her employment several weeks later. These facts are the essential ingredients of the Ninth Circuit's decision. *See Humphrey*, Pet., App. A at 20a-21a:

> By the time of her annual performance review in September, it was abundantly clear to MHA that the flexible start time accommodation was not succeeding; Humphrey had accumulated six unreported absences in each of the months of August and September, and her evaluation stated that her attendance record was "unacceptable". At this point, MHA had a duty to explore further

arrangements to reasonably accommodate Humphrey's disability.

Humphrey also realized that the accommodation was not working, and requested a work at home position. When it received that request, MHA could have either granted it or initiated discussions with Humphrey regarding other alternatives. Instead, MHA denied her request without suggesting any alternative solutions, or exploring with her the possibility of other accommodations. Rather than fulfill its obligation to engage in a cooperative dialogue with Humphrey, *Pierson's e-mail suggested that the matter was closed*: "During our 6/7/95 meeting, you requested to be accommodated for your disability by having a flexible start time, stating that you would have no problems staying for a full shift once you arrived. You were given this flexible start time accommodation which continues to remain in effect".[2] We held in ***Barnett*** that an employer fails to engage in the interactive process as a matter of law where it rejects the employee's proposed accommodations by letter and offers no practical alternatives. See ***Barnett***, 228 F.3d at 1116-17. Similarly, MHA's rejection of Humphrey's work-at-home request and its failure to explore with Humphrey the possibility of other accommodations, once it was

2. The Ninth Circuit's conclusion is by no means extraordinary. *See Bultmeyer v. Fort Wayne Community*, 100 F.3d at 1285: "Bultmeyer may have thought it was futile to ask [for an accommodation], after [the employer] told him that he would not receive any more special treatment".

> aware that the initial arrangement was not effective, constitutes a violation of its duty regarding the mandatory interactive process (emphasis added).

None of the factual or legal issues discussed in the above-quoted portion of the Ninth Circuit decision raise any matters that are novel or out-of-step with the ADA jurisprudence of this Court or other Circuit Courts. Furthermore, the passage above clearly demonstrates that the Ninth Circuit did not announce the broad, per se rule contained in MHA's first question. The Ninth Circuit held that, *under the facts of this case*, one attempt at an accommodation, which proved ineffective, did not insulate MHA from its duties to engage in the interactive process and, hence, from liability under the ADA.[3]

The concept that the ADA, under certain factual circumstances, may require a continuing duty on the part of the employer, as well as the employee, to engage in the interactive process in an effort to find a reasonable and effective accommodation is widely accepted throughout

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3. MHA attempts to paint the Ninth Circuit decision as leading to "employer liability in ways that Congress could never have intended . . . [because] the employer can never be sure that it has done all it can to accommodate a worker before terminating her employment". *See* Pet. at 19. The Ninth Circuit decision does not foreshadow such a result. The Ninth Circuit decision is not about a third, fourth, fifth, etc. opportunity to implement a reasonable accommodation. The Ninth Circuit decision, based on the facts, holds that *one* attempt at an accommodation, which proves ineffective, does not, ipso facto, satisfy the requirements of the ADA. MHA's "parade of horribles" argument demonstrates the dangers that occur when broad generalizations are made about a case without reference to the factual background contained therein.

the other Circuits and comports with the letter and spirit of the ADA. *See Ralph v. Lucent Technologies, Inc.*, 135 F.3d 166, 171 (1st Cir. 1998). ("The duty to provide reasonable accommodation is a continuing one . . . not exhausted by one effort"); *Bultmeyer v. Fort Wayne Community School*, 100 F.3d 1281, 1285 (7th Cir. 1996); *Cehrs v. Northeast Ohio Alzheimer's Research Center*, 155 F.3d 775, 784 (6th Cir. 1998); EEOC: Guidance On Reasonable Accommodation Under The ADA, Pet., App. E at 63a-64a ("If a reasonable accommodation turns out to be ineffective . . . the employer must consider . . . an alternative reasonable accommodation"); *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 648 n.12 (1st Cir. 2000).

In addition, the Ninth Circuit proposition that an employer who does not adequately *respond* to a request for an accommodation may act in bad faith is not novel. *See Bultmeyer*, 100 F.3d at 1285 ("A party that fails to communicate, by way of . . . response, may also be acting in bad faith"); *Taylor v. Phoenixville School District*, 184 F.3d 296, 317 (3d Cir. 1999) ("Employers can show their good faith [by] . . . offer[ing] and discuss[ing] available alternatives when the request is too burdensome"); *Garcia*, 212 F.3d at 648 n.12 ("Here, [the employer] failed to engage in the informal, interactive process. It simply rejected the request for accommodation without further discussion . . .").

Lastly, the rule that the ADA interactive process is mandatory and that liability may arise from the failure to engage in that process is similarly well-accepted. Almost all the Circuits to rule on the question have held that an employer has a mandatory obligation to engage in the interactive process. *See Barnett v. U.S. Air, Inc.*, 228 F.3d

1105, 1114-16 (9th Cir. 2000), *certiorari granted on other grounds*[4], and the cases cited therein.

Given that MHA has mischaracterized the Ninth Circuit decision below, it is clear that there is no purported conflict between this case and the cases cited by MHA (*see Hankins v. The Gap, Inc.* and *Mole v. Buckhorn Rubber Products, Inc.*). Neither *Hankins* nor *Mole* dealt with the issue addressed in this case — namely, the breakdown of the interactive process and assignment of responsibility therefor.

The Petition should be denied for another reason: the first question presented by Petition is based on a factual dispute (*i.e.*, did Humphrey categorically and finally reject MHA's explicit offer of a leave of absence at the June 7 meeting) that was never resolved and, therefore, was not germane to the Ninth Circuit's decision. *See Humphrey*, Pet., App. at 4a: "As it turns out, this factual dispute is not material to our ruling on appeal". It is true that the Ninth Circuit stated that its ruling would not change even if it assumed that Humphrey initially "turned down the leave of absence in June in favor of a flexible start time arrangement". However, that statement is dicta. This Court should not attempt to review a legal issue for which the factual predicate is unresolved in and immaterial to the decision below.

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4. The Petition For Writ Of Certiorari in *Barnett* raised two questions, one dealing with the interaction between the ADA and an employer seniority policy and the other dealing with the requirements of the interactive process under the ADA. This Supreme Court denied the Petition as to the second question. Certainly, the facts and holding of the Ninth Circuit decision herein present no more compelling reason for review by this Court than did the similar issue in *Barnett*. *See U.S. Airways v. Barnett*, Docket No. 00-1250.

In conclusion, the Ninth Circuit decision rests on its unique facts and does not establish any wide-ranging, general rule which justifies review by this Court. The Ninth Circuit decision is consistent with and reflective of the case-by-case approach which underscores ADA jurisprudence. *See Garcia-Ayala*, 212 F.3d at 650 ("[t]hese are difficult, fact intensive, case-by-case analyses, ill-served by per se rules or stereotypes"); *School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1987) (individualized attention is "essential" to resolution of disability claims); *Cehrs*, 155 F.3d at 782. Accordingly, review of this fact intensive Ninth Circuit decision by this Supreme Court would not serve to resolve any important questions of federal law.

## II. The Ninth Circuit Did Not Hold That Humphrey Was Entitled To An Indefinite Leave Of Absence As MHA's Second Question Claims

The second question presented by MHA suffers from the same malady as its first question: It is purely hypothetical because it does not arise from the facts or the holding of the Ninth Circuit decision. The Ninth Circuit's decision is not about Humphrey's *request* for an indefinite leave of absence. The Ninth Circuit held that, under the facts of this case, a leave of absence was a reasonable accommodation that should have been, at a minimum, *offered* to Humphrey before she was terminated by MHA. *See Humphrey*, Pet., App. A at 22a ("... MHA was under a continuing duty to offer a reasonable accommodation"). Given that the offer was never extended to, let alone discussed with Humphrey after MHA knew that the first accommodation (flexible start time) was failing, the issue of the *length* of the leave of absence never arose in this case.

The issue of the duration of the leave of absence never arose for several other reasons as well. First, MHA conceded that granting a leave of absence would not have imposed an undue hardship. Second, MHA had a policy and practice of granting leaves of absence ranging from six months to two years. Lastly, MHA admitted that it would have given Humphrey a leave of absence had she asked for one at any time before her termination. *See Humphrey*, Pet., App. A at 8a, 22a and District Court Order, App. B at 29a.

*If* MHA had fulfilled its continuing duty to engage in the interactive process and had offered Humphrey a leave of absence between Humphrey's September 18 request for the work-at-home accommodation and her October 10 termination, the issue of the length of the leave of absence would have been considered. MHA could have determined the length in several ways. It could have asked Humphrey for her opinion as to the required length, it could have consulted with the psychiatrist, Dr. Jacisin, who had alerted MHA to the fact that Humphrey might require a leave of absence[5] or it could have simply selected a time period that it believed was reasonable.[6] In any event, once the length of

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5. Dr. Jacisin's initial letter did not specify the exact length of the leave of absence. However, this did not relieve MHA of its responsibilities to make further inquires of Dr. Jacisin if it felt the need to do so. *See Bultmeyer*, 100 F.3d at 1285 ("If the note was too ambiguous and [the employer] did not know what [the employee] wanted, [the employer] easily could have called [the psychiatrist] for a clarification").

6. Even the District Court Judge recognized that MHA cannot rely on an argument that Humphrey was requesting an indefinite leave of absence. *See* District Court Order, Pet., App. B at 34a ("Defendant cannot prevail on this issue by casting it in absolute terms. Nothing prevented defendant from granting plaintiff a leave of absence with a *specific time period*").

the leave of absence was selected, Humphrey would then have been in a position to either accept or reject MHA's offer. Once the above process occurred and the results were known, *i.e.*, Humphrey rejected the offer because it was too short or accepted the offer but was unable to return to work after the specified leave of absence expired,[7] then this case might have been ripe for a determination by the Ninth Circuit on the issue as to the appropriate length of the leave of absence. However, none of the above occurred and, therefore, the Ninth Circuit never reached the issue concerning the length of the leave of absence.[8]

Given that the Ninth Circuit did not hold nor even suggest that an indefinite leave of absence is a reasonable accommodation, *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995) and the other cases cited by MHA are irrelevant and, hence, establish no "conflict among the Circuits".

In conclusion, the factual and legal posture of this case make unworkable MHA's suggestion that this case is the

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7. Presumably, Humphrey would never have rejected a leave of absence because it was "too long" nor would there by any litigation in this case had MHA given Humphrey a leave of absence and she had been able to successfully return to work, either before or at the time of the expiration of the leave.

8. In other words, MHA should not be allowed to profit from its own wrongdoing. The product of MHA's failure to engage in the interactive process in the Fall of 1995 was that the issue of the length of the leave of absence never arose at that time. MHA cannot now seek to take advantage of its own misconduct by arguing that neither Humphrey nor Dr. Jacisin precisely defined the limits of the leave of absence. As noted above, if the interactive process had gone forward, the issues as to the length of the leave of absence would have been resolved at that time.

proper vehicle "to clarify if and when a leave of absence is a reasonable accommodation under the ADA" (*See* Pet. at 26). First, as to the factual issues, MHA conceded that a leave of absence would not have been an undue hardship, that it had a policy of granting leaves of absence and, that if Humphrey had requested one, MHA would have granted the request. These factual concessions by MHA do not create a record appropriate for the wide-ranging review sought by MHA.

Second, as to the legal issues, MHA's suggestions that the Ninth Circuit's decision: (1) is an "approval of indefinite leave" and (2) endorses the proposition that an employer "must allow an employee an indefinite leave of absence" are unsupportable. The Ninth Circuit never addressed these issues because of the factual posture of the case. Therefore, this Court should not grant review of hypothetical questions, unconnected to the record and decision below.

1. As a sub-question of the second question presented, MHA asks this Court to review the Ninth Circuit statement that, under the facts of this case, a leave of absence is a reasonable accommodation if it could "plausibly" have been successful. Once again, MHA attempts to turn a case-specific holding into a per se rule in an attempt to create a "split among the Circuits".

MHA argues that there is a split in the Circuits, *i.e.*, between the Ninth Circuit decision on the one hand and the Eleventh Circuit on the other hand, because the Ninth Circuit used the term "plausibly" and the Eleventh Circuit used the term "likely" when evaluating the reasonability of a leave of absence as an accommodation. However, a close analysis of the factual circumstances of the cases reveal no inconsistency: MHA's Eleventh Circuit case involves a request for an indefinite leave of absence — *Humphrey* does not.

MHA relies chiefly on *Duckett v. Dunlop Tire Co.*, 120 F.3d 1222 (11th Cir. 1997). However, *Duckett* did not involve a detailed analysis of the standard of proof required in evaluating a leave of absence request. Rather, *Duckett* involved an employee's *request* for an indefinite leave of absence. *Id.* at 1226. Relying on *Myers*, another case involving a request for an indefinite leave of absence, *Duckett* held that such a request was unreasonable. *Id.* at 1226. It seems clear, therefore, that *Duckett's* use of the term "likely" is directly related to its evaluation of a request for an indefinite leave of absence and is not an attempt to craft a per se standard of proof for all cases.

Further proof that *Duckett* is consistent with *Humphrey* is that fact that Phillis A. Kravitch, Senior Judge, joined in the decisions in both cases. It is unlikely that she would have done so if they are legally inconsistent with one another, as claimed by MHA.[9]

As noted above, *Humphrey* is *not* about a request for an indefinite leave of absence[10], but about the breakdown of

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9. MHA's reliance on *Hudson v. MCI Telecommunications, Corp.*, 87 F.3d 1167 (10th Cir. 1996) is unavailing for two reasons. First, *Hudson* never used the term "likely" and, second, it also involved a *request* for an indefinite leave: "Because the accommodation plaintiff urges, unpaid leave of indefinite duration, does not constitute a 'reasonable accommodation' under the ADA, we affirm." *Id.* at 1168.

10. In reality, this sub-question is nothing more than a reformulation of the second question's main premise that the Ninth Circuit announced a per se rule approving indefinite leaves of absence. As shown above, that premise had no foundation in the record or decision of the Ninth Circuit. Therefore, there is no basis to grant review of the second question in any incarnation put forth by MHA.

the interactive process, which forestalled any discussion between MHA and Humphrey about the length of the leave of absence that MHA should have offered to Humphrey before firing her. Under these unique facts, the Ninth Circuit's use of the "plausible" standard has no more far-ranging significance than other "terms of art" or standards used by other courts in applying a case-by-case resolution of ADA disability claims. *See Criado v. IBM Corp.*, 145 F.3d 437, 443 (1st Cir. 1998) (a leave of absence "might" return employee to her job); *Bultmeyer*, 100 F.3d at 1285 (employee "may have been able" to perform job with reasonable accommodation); *Garcia-Ayala*, 212 F.3d at 648:

> Some employees, by the nature of their disability, are unable to provide an absolutely assured time for their return to employment, but that does not necessarily make a request for leave to a particular date indefinite. Each case must be scrutinized on its own facts. An unvarying requirement for definiteness again departs from the need for individual factual evaluation.

Accordingly, the petition's second question, like its first, is not deserving of review by this Court.

## CONCLUSION

For the foregoing reasons, the Petition For Writ Of Certiorari should be denied.

Respectfully submitted,

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No. 00-1860

IN THE

# Supreme Court of the United States

MEMORIAL HOSPITALS ASSOCIATION,
*Petitioner*,

v.

CAROLYN HUMPHREY,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

MHA's petition presents two important questions concerning an employer's duty under the ADA to make reasonable accommodations to an employee's disability. The first question is whether an employer's failure to offer a particular accommodation before terminating an employee can be found to violate the statutory obligation to make reasonable accommodations even if the employer had already offered that exact accommodation to the employee and the employee had rejected it. The second question is whether a leave of absence can be found to constitute a "reasonable" accommodation notwithstanding plaintiff's failure to make any showing concerning either the length of leave necessary to address the disability or whether a leave (of any duration) would be likely to address the disability. The Ninth Circuit below, in disagreement with the decisions of other courts of appeals, answered yes to both questions.

Respondent's principal argument against granting the petition is that neither of those questions in fact is raised by the opinion below, and that the decision instead was about a breakdown of the so-called "interactive process" contemplated by the ADA. That is incorrect. The Ninth Circuit indisputably held that MHA violated its duty to make reasonable accommodations by failing to offer a leave of absence before terminating respondent, even though respondent (according to the Ninth Circuit's explicit assumption) already had rejected that exact accommodation when previously offered it by MHA. The Ninth Circuit likewise undeniably found that a leave of absence constitutes a reasonable accommodation in this case without requiring any demonstration whatsoever by respondent as to the length of leave necessary to address her disability or as to whether a leave of any duration would likely have addressed her disability.

The "interactive process" discussion in the opinion below, contrary to respondent's submission, in no way shows

that the decision fails to raise the two questions presented in the petition. Instead, the "interactive process" discussion informs the court's *answer* to the first question presented, and it is entirely irrelevant to the court's analysis of the second question. When addressing the first question, the Ninth Circuit relied on the "interactive process" to conclude that an employer has a "continuing duty to offer a reasonable accommodation," Pet. App. 22a, even if that accommodation was already offered and rejected. The opinion makes no mention of the "interactive process" when addressing the second question presented, because whether a leave of absence is a reasonable accommodation is a separate question from whether MHA can be held liable for failing to reiterate its offer of that accommodation. The opinion below raises both questions presented in the petition, in short, and the "interactive process" discussion does not suggest otherwise.

## I. THERE IS A CIRCUIT CONFLICT ON WHETHER AN EMPLOYEE WHO REJECTS AN ACCOMMODATION CAN BASE AN ADA CLAIM ON THE EMPLOYER'S FAILURE TO REITERATE ITS OFFER OF THE SAME ACCOMMODATION.

1. Because the Brief in Opposition wholly misconceives the basis of the opinion below, it is necessary at the outset briefly to reiterate and clarify the Ninth Circuit's rationale. The ADA prohibits an employer from "not making reasonable accommodations" to the limitations of a disabled employee. 42 U.S.C. § 12112(b)(5)(A). The only potential accommodation at issue in this case is a leave of absence.[1] The district court held that MHA's failure to offer a leave of absence before terminating respondent could not form the basis

[1] The opinion contains some discussion of another conceivable accommodation – *i.e.*, allowing respondent to work at home – but the Ninth Circuit specifically did "not reach this issue because on appeal Humphrey argues only the failure to grant a leave of absence as a violation of the duty to accommodate." Pet. App. 21a n.16.

of an ADA reasonable accommodation claim, finding it "dispositive . . . that [respondent] was initially offered a leave of absence and rejected it, and then failed to request a leave of absence subsequently" prior to her termination. Pet. App. 45a.

The principal issue before the Ninth Circuit thus was whether MHA could be liable for failing to offer a leave of absence before terminating respondent, notwithstanding that she had previously been offered a leave, had rejected it, and had failed subsequently to request a leave or otherwise to apprise MHA before her termination that she was interested in a leave. That is precisely how the opinion below frames the question. *See* Pet. App. 18a ("The remaining question with respect to the duty to accommodate is a purely legal one: was MHA obligated to suggest a leave of absence or to explore other alternatives . . . or was it Humphrey's burden to make an express request for a leave of absence before she was terminated?"). The Ninth Circuit rejected MHA's contention that respondent's failure to ask for a leave of absence before her termination precluded her from prevailing in her claim, concluding that "a leave of absence was a reasonable accommodation for Humphrey's disability" and that "MHA was under a continuing duty to offer a reasonable accommodation." Pet. App. 21a-22a. MHA's "continuing duty to offer a reasonable obligation" thus required it to reiterate its offer of a leave before terminating respondent, even though she had rejected MHA's previous offer of a leave.

That conclusion cannot be reconciled with the holding of the Sixth Circuit in precisely analogous circumstances in *Hankins v. The Gap, Inc.*, 84 F.3d 797 (6th Cir. 1996). Just as respondent in this case had been made aware by MHA that she could take a leave of absence but had rejected the offer of a leave, the employee in *Hankins* was made "clearly aware" of the availability of a leave of absence but had "refus[ed] to accept [the] available reasonable accommoda-

tions." *Id.* at 801, 802. Contrary to the Ninth Circuit's conclusion in this case, the Sixth Circuit in *Hankins* rejected the employee's claim that her employer should have reiterated the availability of a leave of absence before terminating her. According to the Sixth Circuit, "an employer has no duty to reiterate self-evident options to an employee when she is clearly already aware of them." *Id.* at 801. The common sense basis of that holding, as the Eighth Circuit explained in *Mole v. Buckhorn Rubber Products, Inc.*, 165 F.3d 1212 (8th Cir. 1999), is that an employee cannot "expect the employer to read her mind and know she secretly wanted a particular accommodation and then sue the employer for not providing it." *Id.* at 1218 (internal quotation marks omitted). That, however, is precisely what is allowed by the Ninth Circuit's opinion below.

2. Respondent does not suggest that the circumstances in *Hankins* were materially different than those in this case. She instead offers two separate grounds for denying review of the Ninth Circuit's determination that MHA was required to reiterate its offer of a leave of absence before terminating her employment. Both suggested grounds are without merit.

First, respondent submits, the issue of whether MHA was obligated to reiterate its offer of a leave of absence implicates an unresolved "factual dispute," *i.e.*, whether respondent in fact had been offered and had rejected a leave of absence at her June 7 meeting with MHA representatives. Brief in Opposition ("Opp.") at 10. That assertion is flatly incorrect. The district court found that respondent could "raise no genuine issue of material fact as to whether Defendant offered [her] a leave of absence," explaining that respondent's "own deposition testimony makes it clear that Defendant did." Pet. App. 42a; *see also* Pet. App. 45a (discussing "the facts that Plaintiff was initially offered a leave of absence and rejected it"). And the Ninth Circuit did not second-guess that factual determination. To the contrary, the

court deemed that factual issue "not material" to its reasoning, Pet. App. 4a, and *explicitly assumed* in its analysis that the district court's finding was correct, *see* Pet. App. 20a ("assum[ing] that Humphrey turned down the leave of absence in June"). As a result, the court below held that MHA was under a continuing obligation to offer a leave of absence to respondent *regardless* of the assumption that MHA had previously offered, and she had rejected, that very same accommodation.

Respondent's remaining argument against review of the first question presented is equally unpersuasive. Respondent contends that the "the Ninth Circuit decision is not about . . . the failure of an employer to offer an accommodation already offered and rejected," but instead is about "the breakdown of the ADA-mandated interactive process," Opp. 5, and that the opinion below therefore fails to raise the first question presented in the petition. As a result, respondent submits, the opinion below does not address the same question addressed by the Sixth Circuit in *Hankins*. *See* Opp. 10.

Respondent's reasoning confuses the question addressed by the opinion below with the court's *answer* to that question. In a separate section of the opinion entitled "BREAKDOWN OF THE INTERACTIVE PROCESS," the court addressed whether MHA was "obligated to suggest a leave of absence" before terminating respondent, or instead whether – as the district court had found – it was "Humphrey's burden to make an express request for a leave of absence before she was terminated" given that she had already rejected MHA's initial offer of a leave of absence. Pet. App. 18a. The court's discussion of the "interactive process" thus is nothing more than a framework for answering whether MHA was required to reiterate its offer of a leave of absence before terminating respondent, *i.e.*, the first question presented by the petition. It follows that the question *is* raised by the opinion below. The Ninth Circuit answered that question by

concluding that the "interactive process" imposes upon an employer a "continuing duty to offer a reasonable accommodation." Pet. App. 22a. The Sixth Circuit's contrary answer renders the question ripe for this Court's review.

In contending otherwise, respondent appears to assume that the ADA imposes a freestanding requirement upon employers to engage in an "interactive process," and that the Ninth Circuit found a violation of the ADA based solely on a breakdown of the "interactive process." That understanding is incorrect. The "interactive process" concept has been treated by courts, including by the Ninth Circuit below, as a means of apportioning responsibility for a failure to make a reasonable accommodation *where a reasonable accommodation was available but not made*. *See* Pet. App. 21a ("Given MHA's failure to engage in the interactive process, liability is appropriate *if* a reasonable accommodation without undue hardship to the employer would otherwise have been possible.") (emphasis added). A breakdown of the "interactive process" thus does not *itself* violate the ADA: that can only occur where there has been a failure to make a reasonable accommodation. But where there has in fact been a failure to make a reasonable accommodation, an analysis of the "interactive process" can help determine whether the employer or employee should be held responsible for the failure, and thus whether the employee can assert an ADA claim.

Properly conceived, then, the "interactive process" is simply a means of answering the ultimate question in every ADA reasonable accommodation case, *viz.*, whether the employer can be held liable for failing to provide a reasonable accommodation. For instance, the district court in this case found that "it must place the blame for the breakdown in the interactive process with Plaintiff," given that "Plaintiff was initially offered a leave of absence and rejected it, and then failed to request a leave of absence subsequently" prior to her termination. Pet App. 45a. In those circumstances, the

district court reasoned, MHA could not be found liable for failing to provide a leave of absence as an accommodation. *Id.* The Sixth Circuit reached the same conclusion in *Hankins*, ruling that an employer cannot be held liable for failing to offer an accommodation of which an employee has been made aware but has chosen not to accept. The Sixth Circuit thus places responsibility on the employ*ee* in those circumstances for the failure to provide a reasonable accommodation. The Ninth Circuit below, by contrast, imposed a "continuing duty" on the employ*er* "to offer a reasonable accommodation." Pet. App. 22a.

Finally, even if respondent were correct that the Ninth Circuit found a violation of the ADA based exclusively on the "interactive process" – *i.e.*, independently of whether there was an available reasonable accommodation that the employer failed to provide – that would only support the grant of certiorari. No other circuit has held that a failure to engage in the interactive process itself violates the ADA. Every court of appeals to have addressed the question, in fact, has decided to the contrary. *See, e.g., Rehling v. City of Chicago*, 207 F.3d 1009, 1016 (7th Cir. 2000); *Jackan v. New York State Dep't of Labor*, 201 F.3d 562, 566 (2d Cir. 2000); *Willis v. Conopco*, 108 F.3d 282, 285 (11th Cir. 1997). Respondent's apparent understanding of the Ninth Circuit's decision below thus would place that court in conflict with a number of other courts of appeals.[2]

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[2] In *US Airways, Inc. v. Barnett*, No. 00-1250, the Court granted certiorari as to one question in the petition but declined to grant review of a separate question concerning the proper role of the "interactive process" in the resolution of an ADA reasonable accommodation claim. As we have explained here and as the petition and reply brief in support of the petition in *Barnett* also observe, no court has held that a failure of the "interactive process" can independently violate the ADA. But, as the petition in *Barnett* explains further, the courts of appeals appear to have adopted varying views of the role of the "interactive process" in resolving an ADA reasonable accommodation claim, and the approach of a

## II. THE CIRCUITS DISAGREE ABOUT THE STANDARDS FOR DETERMINING WHEN A LEAVE OF ABSENCE CONSTITUTES A REASONABLE ACCOMMODATION.

The Ninth Circuit's holding that a plaintiff need only "satisfy the minimal requirement that a leave of absence could plausibly have enabled [her] adequately to perform her job," Pet. App. 15a-16a, diverges from the holdings of other circuits along two related dimensions, *i.e.*, the plaintiff's burden of showing: (1) *when* that accommodation would be successful, *see* Pet. 19-22; and (2) *whether* that accommodation would be successful, *see* Pet. 22-26.

Whereas the Ninth Circuit found below that "a leave of absence was a reasonable accommodation for Humphrey's disability," Pet. App. 21a-22a, without requiring any evidence of a temporal limit on the leave, the Fourth Circuit held in *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995), that, absent a temporal limit, the requested leave is "indefinite" and *per se* unreasonable. *See* Pet. 20-22. Similarly, whereas the Ninth Circuit held that "the ADA does not require an employee to show that a leave of absence is . . . likely to be successful to prove that it is a reasonable accommodation," Pet. App. 15a-16a, the Eleventh Circuit held in *Duckett v. Dunlop Tire Corp.*, 120 F.3d 1222 (11th Cir. 1997), that a leave "is not 'reasonable' within the meaning of the ADA" without an adequate showing that the leave is "likely" to enable a successful return to work. *Id.* at 1226; *see* Pet. 22-23.[3] The Ninth Circuit's standard for evaluating whether a

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number of those courts leads to a confused analysis of such claims. This case affords an appropriate vehicle for clarifying the proper role of the "interactive process" in resolving a reasonable accommodation claim.

[3] In *Hudson v. LCI Telecomms. Corp.*, 87 F.3d 1167 (10th Cir. 1996), likewise, the Tenth Circuit rejected an employee's claim that a leave of absence was a reasonable accommodation because the employee (like respondent here) "had failed to present any evidence of the expected

leave of absence is a reasonable accommodation, in short, is far more lenient than the one applied by other circuits.[4]

Respondent's principal argument against review of that issue is that this case does not involve a "*request* for an indefinite leave of absence." Opp. 11. According to respondent, this case instead concerns whether a leave of absence "should have been, at a minimum, *offered* to [respondent] before she was terminated," and because MHA did not reiterate its offer of a leave before termination, "the issue of the *length* of the leave of absence never arose." *Id.*

That reasoning simply conflates the two independent questions presented in the petition, *viz.*, whether respondent has satisfied her burden in this lawsuit of showing that a leave of absence is a reasonable accommodation, and whether – even assuming that the leave is a reasonable accommodation – MHA can be held liable for failing to reiterate its offer of that accommodation prior to terminating respondent. Indeed, the opinion below treats those questions as entirely separate, making explicit that the question whether MHA was "required to offer Humphrey a leave of absence or other accommodation unless she specifically requested it" is distinct from the question whether she satisfied the "minimal" burden imposed by the court to show that a leave of absence "could plausibly have enabled [her]

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duration of her impairment" or when she "could expect to resume her regular duties." *Id.* at 1169.

[4] In this case, for example, the only evidence supporting respondent's contention that a leave was a reasonable accommodation was a letter from her doctor that failed to state either (1) that the leave would be definite in duration, or (2) that the leave would likely enable respondent to resume her regular duties. That letter still sufficed to establish a reasonable accommodation under the Ninth Circuit's minimal requirement that a leave need only "plausibly" enable a return to work at some undefined point in the future. *See* Pet. App. 15a. The same evidence clearly would *not* suffice in other circuits. *See* Pet. 20-23.

adequately to perform her job." Pet. App. 15a-16a. After all, even assuming that an employer must reiterate its previously rejected offer of a leave of absence before it can terminate an employee, the employer need not offer a leave of absence at all unless the leave qualifies as a "reasonable" accommodation. The second question presented in the petition concerns the nature of a plaintiff's burden in the latter regard; and the discrepancy between the Ninth Circuit's "minimal" standard and the far stricter standard applied by other courts warrants this Court's review.

Respondent's remaining arguments against review of the second question are entirely without merit. For instance, respondent states that "MHA conceded that granting a leave of absence would not have imposed an undue hardship." Opp. 12. But whether a reasonable accommodation imposes an "undue hardship" is wholly distinct from whether it constitutes a "reasonable" accommodation in the first place. *See* 42 U.S.C. § 12112(b)(5)(A). Respondent also notes that "MHA had a policy and practice of granting leaves of absence ranging from six months to two years," and that "MHA admitted that it would have given Humphrey a leave of absence had she asked for one." *Id.* But the existence of a policy generally allowing leaves of a particular length in no way suggests an intention to accept a leave where there is no limitation on its duration. And in any event, as the Fourth Circuit observed in *Myers*, a "particular accommodation is not necessarily reasonable, and thus federally mandated, simply because the [employer] elects to establish it as a matter of policy." 50 F.3d at 284.

## CONCLUSION

The petition for a writ of certiorari should be granted.

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# In the Supreme Court of the United States

MEMORIAL HOSPITALS ASSOCIATION, PETITIONER

*v.*

CAROLYN HUMPHREY

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## QUESTIONS PRESENTED

Petitioner seeks to present the following questions:

1. Whether an employer must offer a "reasonable accommodation" to an employee before terminating her employment even when the employee knows about and has previously rejected the reasonable accommodation.

2. Whether an indefinite leave of absence that might plausibly allow an employee to return to work qualifies as a "reasonable accommodation."

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# In the Supreme Court of the United States

No. 00-1860

MEMORIAL HOSPITALS ASSOCIATION, PETITIONER

*v.*

CAROLYN HUMPHREY

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

### STATEMENT

1. Title I of the Americans with Disabilities Act of 1990 (ADA), provides that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to * * * discharge of employees * * * and other terms, conditions, and privileges of employment." 42 U.S.C. 12112(a). A "qualified individual with a disability" is an individual with a disability "who, with or without reasonable accommodation, can perform the essential functions of the employment position." 42 U.S.C. 12111(8). The ADA defines illegal discrimination to include "not making reasonable accommodations

to the known physical or mental limitations of an otherwise qualified individual with a disability," unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business of [the] covered entity." 42 U.S.C. 12112(b)(5)(A). The ADA requires the Equal Employment Opportunity Commission (EEOC) to issue regulations to carry out the provisions of Title I. 42 U.S.C. 12116. Following public notice and comment, the EEOC issued such regulations. 56 Fed. Reg. 35,726 (1991); 29 C.F.R. Pt. 1630. The Appendix to the regulations lists "leave" as one type of reasonable accommodation. 29 C.F.R. Pt. 1630, App. § 1630.2(o).

2. Carolyn Humphrey (respondent) worked as a transcriptionist for Memorial Hospitals Association (petitioner). Pet. App. 2a. In 1989, respondent began to engage in a series of obsessive rituals that made it difficult for her to get to work on time, or on some occasions, at all. *Ibid.* Petitioner issued a series of disciplinary warnings to respondent for tardiness and absenteeism and required her to attend counseling sessions. *Id.* at 2a-3a. Respondent asked petitioner whether she could see a psychiatrist for evaluation, and petitioner referred her to Dr. John Jacisin. *Id.* at 3a. Dr. Jacisin diagnosed respondent as suffering from Obsessive Compulsive Disorder (OCD), and sent a letter to petitioner explaining that the disorder was contributing to respondent's tardiness. *Ibid.* He also stated:

> I believe that we can treat this, although, the treatment may take a while. I do believe that she would qualify under the Americans with Disability Act, although, I would like to see her continue to work, but if it is proving to be a major personnel problem,

> she may have to take some time off until we can get the symptoms better under control.

*Id.* at 4a.

Petitioner met with respondent to discuss Dr. Jacisin's letter. Pet. App. 4a. Petitioner claims that it offered respondent a leave of absence, and that she rejected the offer; respondent claims that no such offer was made. *Ibid.* It is undisputed that petitioner and respondent ultimately agreed on an accommodation under which respondent could report to work at any time as long as she worked an eight-hour shift once she arrived. *Id.* at 5a.

Respondent nonetheless continued to miss work, and after more than three months, she asked for permission to work at home. Pet. App. 5a. Although petitioner permits some transcriptionists to work at home, it denied respondent's request because of her prior disciplinary warnings for tardiness and absenteeism. *Id.* at 6a. Petitioner did not offer an alternative accommodation or suggest that it would be willing to work further with respondent to identify another accommodation. *Ibid.* Instead, petitioner reminded respondent that it had accommodated her through a flexible work-time schedule and suggested that the matter was closed. *Ibid.* Respondent continued to perform well when she was able to make it to work. *Id.* at 6a-7a. She exceeded expectations concerning productivity levels and error rates, and was able to complete particularly difficult transcripts. *Id.* at 7a. Nonetheless, after she missed two additional days of work, petitioner fired her. *Id.* at 8a.

3. Respondent filed suit against petitioner, alleging, *inter alia*, that petitioner had violated the ADA by failing to provide her with a leave of absence or per-

mitting her to work at home. Pet. App. 8a. The district court granted petitioner's motion for summary judgment. *Id.* at 25a-47a. Respondent did not file a cross-motion for summary judgment.

The district court first held that a leave of absence may be a reasonable accommodation in some circumstances and that, although the ADA likely did not require an indefinite leave of absence, petitioner could not prevail on that ground. Pet. App. 32a. The court explained that "[n]othing prevented [petitioner] from granting [respondent] a leave of absence with a specific time period." *Id.* at 34a (emphasis omitted). The district court nonetheless granted petitioner's motion for summary judgment, finding "dispositive the facts that [respondent] was initially offered a leave of absence and rejected it, and then failed to request a leave of absence subsequently." *Id.* at 45a.[1]

4. A panel of the Ninth Circuit reversed. Pet. App. 1a-24a. The court first held that a leave of absence may be a reasonable accommodation under the ADA when such a leave would permit an employee to perform the essential functions of the job upon the employee's return. *Id.* at 14a. The court of appeals further held that an employee is not required to show that a leave of absence "is certain or even likely to be successful," but only that a leave "could have plausibly enabled" successful performance. *Id.* at 15a. The court concluded that respondent satisfied that burden at the summary judgment stage through the introduction of Dr. Jacisin's statements that respondent's condition

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[1] The district court also held that an at-home work arrangement would not have been a reasonable accommodation for respondent. *Id.* at 34a-35a. Respondent did not raise that issue on appeal, *id.* at 21a n.6, and it is not presented here.

was treatable and that she might have to take some time off in order to get her symptoms under control. *Ibid.*

The court of appeals identified the remaining question as a purely legal one: "was [petitioner] obligated to suggest a leave of absence or to explore other alternatives in response to [respondent's] request for a work-at-home position, or was it [respondent's] burden to make an express request for a leave of absence before she was terminated." Pet. App. 18a. The court concluded that petitioner "had an affirmative duty under the ADA to explore further methods of accommodation before terminating" respondent. *Ibid.*

The court of appeals held that "[o]nce an employer becomes aware of the need for accommodation, that employer has a mandatory obligation under the ADA to engage in an interactive process with the employee to identify and implement appropriate reasonable accommodations." Pet. App. 18a. That obligation, the court concluded, "extends beyond the first attempt at accommodation and continues when the employee asks for a different accommodation or where the employer is aware that the initial accommodation is failing and further accommodation is needed." *Id.* at 19a. The court explained that respondent had such a continuing obligation here because Dr. Jacisin's letter put petitioner on notice that respondent might eventually need a leave of absence, respondent's acceptance of a flexible work-time arrangement did not forfeit her right to an alternative accommodation upon the failure of that arrangement, and respondent eventually notified petitioner that the flexible work-time arrangement was not working out. In those circumstances, the court held, once respondent stated that the flexible work-time arrangement was not working out and asked for an at-

home work arrangement, petitioner had an "obligation to engage in a cooperative dialogue with [respondent]," rather than suggesting "that the matter was closed." *Id.* at 20a-21a.

The court further held that "[g]iven [petitioner's] failure to engage in the interactive process, liability is appropriate if a reasonable accommodation without undue hardship to the employer would otherwise have been possible." Pet. App. 21a. Because the court had concluded (as part of its "qualified individual" analysis) that a leave of absence was a reasonable accommodation, and because petitioner conceded that a leave of absence would not pose an undue hardship, the court held that (assuming that respondent is a qualified individual with a disability) petitioner violated the ADA's reasonable accommodation requirement. *Id.* at 22a.

## ARGUMENT

This case is not an appropriate vehicle for resolving the question whether an employer violates the ADA when it fails to offer an accommodation that an employee knows about and has previously rejected. Neither the court of appeals' decision nor the underlying facts squarely present that question. Respondent was never presented with a clear choice between a leave of absence or no accommodation. At most, respondent constructively rejected a leave of absence by preferring another accommodation that kept her on the job. As applied to such cases, petitioner's proposed rejected accommodation defense is not supported by the text of the ADA or the EEOC's regulations. In addition, petitioner's first question has not emerged as an issue of recurring importance, and there is no conflict in the circuits. Accordingly, review on petitioner's first question is not warranted.

Review is also not warranted on the question whether an indefinite leave of absence that might plausibly allow an employee to return to work qualifies as a reasonable accommodation. The court of appeals did not decide whether the ADA may require an *indefinite* leave of absence, and the facts of the case do not clearly raise that issue. The Ninth Circuit's holding that an accommodation may be required if it could plausibly benefit the employee conflicts with the Eleventh Circuit's description of the applicable standard. But it also conflicts with a prior Ninth Circuit decision. Because the Ninth Circuit may well resolve that intra-circuit conflict in a way that eliminates the circuit conflict, intervention by this Court at this time would be premature.

This case is also in an interlocutory posture. There is no reason to depart from this Court's general practice of awaiting a final judgment before it grants review.

## I. PETITIONER'S FIRST QUESTION DOES NOT WARRANT REVIEW

Petitioner contends (Pet. 13) that the court of appeals held that it could be liable under the ADA for failing to offer respondent a leave of absence even though respondent knew about and had previously rejected that accommodation. Based on that understanding of the court of appeals' decision, petitioner seeks review of the question whether an employer violates the ADA when it fails to offer an accommodation that an employee knows about and has previously rejected. For several reasons, review of that question is not warranted in this case.

### A. This Case Is Not An Appropriate Vehicle For Addressing Petitioner's Proposed Rejected Accommodation Defense

First, this case is not an appropriate vehicle for resolving petitioner's first question because the court of appeals adopted a theory of liability that differs from the one that petitioner attributes to it. The court of appeals held that petitioner could be liable under the ADA for failing to participate in cooperative discussions with respondent about possible accommodations under circumstances in which a leave of absence would have been a reasonable accommodation, not for failing to offer that specific accommodation as such. Pet. App. 20a-21a. Liability flowed from petitioner's failure to consider any alternative to respondent's suggested work-at-home arrangement, not from the failure to offer a leave of absence.

Thus, the court identified the relevant legal inquiry in the following terms: "was [petitioner] obligated to suggest a leave of absence *or to explore other alternatives* in response to [respondent's] request for a work-at-home position, or was it [respondent's] burden to make an express request for a leave of absence before she was terminated." *Id.* at 18a (emphasis added). It resolved that question by holding that petitioner "had an affirmative duty under the ADA *to explore further methods of accommodation* before terminating [respondent]." *Ibid.* (emphasis added). The court specifically explained that petitioner's "failure to explore with [respondent] the possibility of other accommodations, once it was aware that the initial arrangement was not effective, constitutes a violation of its duty regarding the mandatory interactive process," and that "[g]iven [petitioner's] failure

to engage in the interactive process, liability is appropriate if a reasonable accommodation without undue hardship to the employer would otherwise have been possible." *Id.* at 21a. The court then concluded that "a leave of absence was a reasonable accommodation." *Id.* at 21a-22a. Accordingly, petitioner's first question is not squarely presented.

In addition, in the circumstances of this case, petitioner's focus on respondent's previous rejection of a leave of absence in the first question has an abstract and hypothetical quality. Respondent takes issue with the basic premise of this question—she denies that petitioner offered her a leave of absence which she then rejected. Pet. App. 4a. Although the district court held that respondent's evidence did not create a material issue of fact on that issue, *id.* at 42a, the court of appeals did not affirm that holding. Instead, it stated that "this factual dispute is *not material* to our ruling on appeal." *Id.* at 4a (emphasis added). There has therefore been no definitive resolution of the factual issue that underlies petitioner's first question. Equally important, the very fact that the Ninth Circuit deemed the factual dispute concerning whether a leave of absence has been previously offered and rejected "not material" to "its analysis" demonstrates that this case is a poor vehicle to consider whether such a prior offer and rejection gives an employer an immunity from ADA liability.

**B. As Applied To Circumstances Like Those Presented Here, Petitioner's Proposed Rejected Accommodation Defense Is Not Supported By The Text Of The ADA Or The EEOC's Regulations**

Even accepting the district court's assessment of the undisputed evidence, respondent rejected a leave of

absence only in the sense that when petitioner presented her with a choice between a leave of absence and a flexible start-time arrangement, she chose the latter. Pet. App. 39a-43a. Respondent never suggested that if her flexible start-time arrangement ultimately failed, she would not accept a leave of absence. *Ibid.* Nor did petitioner ever present respondent with a clear choice between a leave of absence or no accommodation. At most, this case involves a "constructive" rejection of a leave of absence in light of respondent's initial preference for a flexible work schedule.

It is far from clear why respondent's initial preference for an accommodation that allowed her to continue to work despite her disability (which is the basic goal of the ADA) should excuse any further obligation on the parties to find a reasonable accommodation if the initial accommodation proves inadequate. That is particularly true here given that (1) it became apparent to petitioner at some point that respondent's flexible work-time arrangement was not working out, (2) respondent asked petitioner for a new accommodation, and (3) petitioner knew from Dr. Jacisin's letter that respondent might need a leave of absence if her initial accommodation was not successful. *Id.* at 19a-21a. Nor is it clear why respondent should bear responsibility for having failed to ask for a leave of absence when she affirmatively asked for a new accommodation, namely, work at home. At the very least, the question whether, under those particular circumstances, an employer may be liable under the ADA for failing to provide a reasonable accommodation would seem to require a fact-intensive inquiry, rather than the application of a mechanical rule.

Petitioner nonetheless seeks a new per se rule that an employer may *never* be liable for failing to make an accommodation that an employee knows about and has rejected. At least as applied to cases where an employee has not categorically rejected the accommodation, but at most has constructively rejected the accommodation by affirmatively accepting a less drastic accommodation first, petitioner's proposed rule cannot be derived from the text of the ADA.

The ADA defines unlawful discrimination to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability," unless the employer "can demonstrate that the accommodation would impose an undue hardship on the operation of the business of [the] covered entity." 42 U.S.C. 12112(b)(5)(A). Under the text of the ADA, an employer has no statutory duty to accommodate an employee unless it "know[s]" about the employee's "physical or mental limitations." But once an employee provides that information, the statutory text contemplates that the employer shall have primary responsibility for identifying and implementing an appropriate "reasonable accommodation." The text would not support holding an employer liable for failing to a make a reasonable accommodation that the employer offered and the employee *categorically* rejected. See 29 C.F.R. 1630.9. However, nothing in the statutory text suggests that an employer may never be liable for failing to make an otherwise reasonable accommodation simply because an employee previously preferred a less drastic accommodation.[2]

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[2] As petitioner notes (Pet. 18) the EEOC's regulations provide that if an individual with a disability "rejects a reasonable accommodation * * * that is necessary to enable the individual to

Nor is there support for such a rule in EEOC's interpretive guidance. The EEOC has stated in its interpretive guidance that "[o]nce a qualified individual with a disability has requested provision of a reasonable accommodation, the employer must make a reasonable effort to determine the appropriate accommodation." 29 C.F.R. Pt. 1630, App. § 1630.9, at 364. The EEOC has further explained that "[i]f a reasonable accommodation turns out to be ineffective and the employee with a disability remains unable to perform an essential function, the employer must consider whether there would be an alternative reasonable accommodation that would not pose an undue hardship." Pet. App. 63a-64a. Nothing in the EEOC's interpretive guidance suggests that an employer may rule out an otherwise appropriate accommodation in all cases simply because an employee chose to try a less drastic accommodation first. Thus, as applied to cases where an employee does not categorically reject an accommodation, but simply previously preferred a less drastic accommodation, petitioner's proposed per se rule is supported by neither the text of the ADA nor EEOC's interpretation of the Act.

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perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified individual with a disability." 29 C.F.R. 1630.9(d). But respondent did not "reject[]" a leave of absence in the sense in which that term is used in the regulations. Even accepting the district court's assessment of the evidence, she accepted petitioner's offer of a flexible start-time arrangement, without suggesting that she would be unwilling to accept a leave of absence if the initial accommodation failed and there was no other reasonable accommodation available that would keep her on the job. At no point after respondent sought a new accommodation based on the failure of the initial one did respondent "reject[]" a leave of absence.

### C. Petitioner's First Question Does Not Raise An Issue Of Recurring Importance And There Is No Conflict In The Circuits

Petitioner's first question also does not raise any issue that has as yet emerged as one of recurring or widespread importance. Petitioner cites no case in which a court has adopted the per se rule it proposes in the context of an employee who has not categorically rejected a proposed accommodation, but has simply embraced an alternative accommodation that keeps the employee on the job. Indeed, petitioner cites only a single case in which an employee has sought to establish liability based on an employer's failure to offer explicitly an accommodation that the employee knew about and rejected. See *Hankins* v. *The Gap, Inc.*, 84 F.3d 797 (6th Cir. 1996).

Petitioner contends (Pet. 14-15) that the decision below conflicts with *Hankins*, but there is no conflict. *Hankins* involved a very different factual scenario. In *Hankins*, an employee asserted that The Gap violated the ADA by failing to grant her request for a transfer to another job once it became aware of her migraine condition. The Sixth Circuit held that such a transfer would not have been a reasonable accommodation. 84 F.3d at 800. The court also held that The Gap had adequately accommodated the employee's condition by allowing her to use her ordinary leave time when she experienced migraines. *Id.* at 801. The court rejected the employee's contention that The Gap had not adequately notified her of that option, which was made available to all employees, on the ground that "it should * * * have been self-evident to Hankins that going to the medical center or asking for time off is what she needed to do when a migraine occurred." *Ibid.* The

court explained that "an employer has no duty to reiterate self-evident options to an employee when she is clearly already aware of them." *Ibid.* The court also emphasized that "Hankins effectively rejected the obvious reasonable accommodations provided by The Gap," and "proposed other, more dubious accommodations instead." *Id.* at 802.

Petitioner seeks to extrapolate from *Hankins* the principle that an employer may never be liable under the ADA for failing to make an accommodation that an employee knows about and has rejected at some point in the past. But the decision does not announce any such per se rule. In effect, the employee in *Hankins* categorically rejected an obvious reasonable accommodation, while insisting on one that would not have permitted her to perform the job successfully. Moreover, there was no issue of a constructive rejection by preferring one option over another. The employee in *Hankins* never accepted any accommodation. In contrast, respondent chose an option offered by petitioner that kept her on the job, without categorically ruling out a leave of absence if that later became necessary. In addition, the key issue in *Hankins* was the employee's failure to take advantage of an existing leave program open to all employees. The employee in *Hankins* could have used her ordinary leave to accommodate her migraine condition. In contrast, respondent would have had to go outside the generally available job benefits and receive authorization for a longer leave of absence to accommodate her condition, and when respondent asked for a new accommodation, petitioner told her that it had already accommodated her through a flexible work-time arrangement and suggested to her that the matter was closed.

In asserting a split in the circuits, petitioner argues that it is irrelevant that the two courts asked different *questions*—the key point, in petitioner's view, is that they provided different *answers* when confronted with employees who "rejected" an available accommodation. See Pet. Reply Br. 5. However, the reason that the courts asked different questions is that they were confronted with very different cases. The Sixth Circuit dealt with an employee who failed to take advantage of generally available policies. The Ninth Circuit addressed an employee who preferred one option over another and then months later had another accommodation denied. Because the crucial facts in this case differ so much from those in *Hankins*, there is no reason to believe that the Sixth Circuit would have decided this case any differently from the Ninth Circuit. Nor is there any reason to believe that the Ninth Circuit would have decided *Hankins* any differently from the Sixth Circuit.

For similar reasons, the decision below does not conflict (Pet. 15) with the Eighth Circuit's decision in *Mole* v. *Buckhorn Rubber Products, Inc.*, 165 F.3d 1212, cert. denied, 528 U.S. 821 (1999). In *Mole*, the Eighth Circuit held that an employer had not violated its duty to accommodate a disabled employee. The court based its decision on the particular facts of the case, and not on any broad legal principle. In particular, the court emphasized that (1) the employer repeatedly attempted to accommodate the employee, (2) the employee never advised her employer that a different accommodation might be necessary, and (3) the employer made good faith efforts to help the employee determine if other accommodations might be needed. *Id.* at 1218. In those circumstances, the court con-

cluded, the employee could not stand silent, expecting the employer to "read her mind." *Ibid.*

The situation here is different from that in *Mole* in every relevant respect. While the employer in *Mole* made numerous attempts to accommodate the disabled employee, petitioner made a single attempt. While the employee in *Mole* did not inform her employer that she needed a new accommodation, respondent informed petitioner that she needed a new accommodation. While the employer in *Mole* made good faith attempts to determine if other accommodations might be needed, when respondent asked for a new accommodation, petitioner failed to initiate cooperative discussions and instead suggested that the matter was closed. While the employer in *Mole* had no information that another specific accommodation might be effective, petitioner knew from Dr. Jacisin's letter that respondent might need a leave of absence. The Eighth Circuit's fact-specific conclusion in *Mole* that the employer in that case did not violate the ADA therefore does not conflict with the court of appeals' fact-specific conclusion in this case that petitioner violated the ADA.

## II. PETITIONER'S SECOND QUESTION DOES NOT WARRANT REVIEW

Petitioner also seeks review of the court of appeals' holding that a leave of absence would have been a reasonable accommodation for respondent. Petitioner objects to the court of appeals' holding on two related grounds.[3]

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[3] Petitioner does not challenge the court of appeals' holding that a leave of absence may be a reasonable accommodation in some circumstances. That holding is consistent with EEOC's interpretive guidance, 29 C.F.R. Pt. 1630, App. § 1630.2(o), at 357,

### A. The Question Whether The ADA May Require An Indefinite Leave Of Absence Is Not Presented

Petitioner first contends (Pet. 19-26) that the Ninth Circuit held, in conflict with other circuits, that an *indefinite* leave of absence may be a reasonable accommodation. But the Ninth Circuit did not adopt any such holding. Its opinion simply does not address whether an indefinite leave may be a reasonable accommodation. Petitioner complains (Pet. 19-20) that the court of appeals' silence on the issue amounts to a holding that an "indefinite" leave of absence may be a reasonable accommodation. But the failure to address an argument is not a holding. However desirable it may have been for the Ninth Circuit to address petitioner's argument that an employee must introduce evidence on the duration of leave, the court's failure to do so cannot create binding legal precedent on that issue.

Nor is it even clear that the issue is raised by the facts of this case. Dr. Jacisin stated that a leave of absence of "some time" might be needed, but he did not suggest that the leave would have to be indefinite. Pet. App. 15a. Moreover, the district court rejected petitioner's contention that respondent sought to hold it liable for failing to offer indefinite leave, on the ground that "[n]othing prevented [petitioner] from granting [respondent] a leave of absence with a specific time period." *Id.* at 34a (emphasis omitted). In fact, as both courts below appear to have recognized, petitioner's

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and with decisions of other circuits. *Garcia-Ayala* v. *Lederle Parenterals, Inc.*, 212 F.3d 638, 647 (1st Cir. 2000); *Cehrs* v. *Northeast Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 782 (6th Cir. 1998); *Haschmann* v. *Time Warner Entm't Co.*, 151 F.3d 591, 601 (7th Cir. 1998); *Rascon* v. *U.S. West Communications, Inc.*, 143 F.3d 1324, 1333-1334 (10th Cir. 1998).

failure to respond to respondent's request to work at home with a specific leave of absence proposal pretermitted any negotiation over what length of leave would be either sufficient to address respondent's disability or reasonable in light of petitioner's overall leave policy. This case therefore does not present the question whether an indefinite leave of absence may be a reasonable accommodation.

**B. The Question Whether An Accommodation May Be Required If It Could Plausibly Benefit The Employee Is Not Ripe For Review**

Petitioner also challenges (Pet. 22) the Ninth Circuit's holding that a leave of absence is a reasonable accommodation if it could "plausibly" permit the employee to perform the essential functions of the job upon return, even if successful performance upon return is not likely. Although that holding conflicts with Eleventh Circuit's description of the applicable burden of proof, see *Duckett* v. *Dunlop Tire Corp.*, 120 F.3d 1222, 1226 (1997) (per curiam), review of that issue also is not warranted in this case.[4]

In holding that a plaintiff need not show that an accommodation is likely to work, the Ninth Circuit departed from its prior holding in *Mustafa* v. *Clark County School District*, 157 F.3d 1169 (1998) (per curiam). There, the Ninth Circuit held that a plaintiff "bears the initial burden of showing that the suggested accommodation would, *more probably than not*, have

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[4] The other case discussed by petitioner addresses the extent to which an employee must introduce evidence on the expected duration of her impairment. *Hudson* v. *MCI Telecomms. Corp.*, 87 F.3d 1167 (10th Cir. 1996). It does not address whether a plaintiff must prove that the success of an accommodation is likely, rather than plausible.

resulted in his ability to perform the essential functions of his job." *Id.* at 1176 (emphasis added; internal quoation marks omitted). Although *Mustafa* was decided under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (1994 & Supp. 1999), Section 504 incorporates the ADA's employment discrimination standards. See 29 U.S.C. 794(d). *Mustafa* therefore squarely conflicts with the decision in this case.

Despite that intra-circuit conflict, petitioner did not seek an en banc resolution of the issue. In future cases, parties in the Ninth Circuit will be free to urge that circuit to follow *Mustafa*, rather than the decision in this case, or alternatively to seek an en banc resolution of the issue. Accordingly, intervention by this Court at this time would be premature. That is particularly true since the Ninth and Eleventh Circuits are the only two circuits to have addressed the issue; neither court devoted much analysis to the issue; and it is not yet clear that the difference in standards has any practical significance.

## III. REVIEW WOULD BE PREMATURE ON EITHER QUESTION BECAUSE THE CASE IS IN AN INTERLOCUTORY POSTURE

Review is also not warranted in this case because petitioner seeks review of an interlocutory decision reversing a grant of summary judgment. As a general matter, this Court awaits a final decision before granting certiorari in a case. *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); *Brotherhood of Locomotive Fireman & Enginemen* v. *Bangor & Aroostook R.R.*, 389

U.S. 327, 328 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court.") (per curiam). There is no reason to depart from, and good reasons to follow, that general practice here. Further factual development on such matters as whether petitioner initially offered respondent a leave of absence, the necessary duration of respondent's leave, and the likelihood that respondent would have been able to perform the job upon her return may help to clarify the issues that are actually presented in this case. Additional decisions from the courts below on a fully developed record may also facilitate that assessment.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

# Supreme Court of the United States

MEMORIAL HOSPITALS ASSOCIATION,
*Petitioner*,

v.

CAROLYN HUMPHREY,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner Memorial Hospitals Association ("MHA") submits this supplemental brief pursuant to Supreme Court Rule 15.8 to comment upon the brief *amicus curiae* filed by the United States in response to this Court's invitation. The government recommends against granting certiorari on either of the two questions presented by the petition. The government's analysis, as we explain here, is flawed in a number of significant respects.

### I. THE FIRST QUESTION PRESENTED BY THE PETITION WARRANTS THIS COURT'S REVIEW.

The first question presented by the petition is whether, as the Ninth Circuit held below, an employer's failure to reiterate its offer of a particular accommodation before terminating an employee can be found to violate the ADA's "reasonable accommodation" obligation even if the employer had already offered that exact accommodation and the employee had rejected it. The government contends that: (1) this case is not an appropriate vehicle for addressing the question; (2) there is no conflict in the courts of appeals on the issue; and (3) the result below is correct on the merits. Each of those contentions is without merit.

1. According to the government (*see* Govt. Br. 8-9), this case presents a poor vehicle for addressing the first question presented by the petition. The principal reason, the government submits, is that the basis of the Ninth Circuit's decision below was MHA's failure to participate in cooperative discussions with respondent to "explore" alternative accommodations to the unsuccessful flexible start-time arrangement, not MHA's failure to reiterate its offer of the particular accommodation of a leave-of-absence. It follows, the government asserts, that the case is not an appropriate vehicle for addressing whether an employer can be held liable for failing to reiterate its offer of a particular accommodation – here, a

leave of absence – that was already offered and rejected.

The government's understanding of the Ninth Circuit's opinion is incorrect, and it reflects the very same misconception that underlies respondent's flawed analysis. Contrary to the government's suggestion, the opinion below does not hold that the mere failure to "explore" alternative accommodations with an employee can *itself* violate the ADA's reasonable accommodation requirement. As our reply brief explains, there is no such free-standing duty under the ADA to "explore" accommodations with an employee – or, equivalently, to engage in an "interactive process" with an employee to identify potential accommodations. *See* Pet. Rep. Br. 5-7. The ADA prohibits the failure to *make* a reasonable accommodation, *see* 42 U.S.C. § 12112(b)(5)(A), not the mere failure to *explore* accommodations with an employee even where the employee is unable to identify an available reasonable accommodation that should have been made. Accordingly, the opinion below makes clear that "liability is appropriate" only "if a reasonable accommodation" would "have been possible," and finds that "a leave of absence was a reasonable accommodation for [respondent's] disability." Pet. App. 18a.[1]

The question addressed by the opinion below and squarely presented by this case is whether, given the Ninth Circuit's conclusion that there in fact *was* an available reasonable accommodation (a leave of absence), the employer can be held liable for failing to provide that accommodation even it was already offered and rejected, or whether it instead is incumbent upon the employ*ee* in those circum-

[1] If the government's interpretation of the opinion below is correct – in other words, if the opinion below in fact is best read to hold that MHA's alleged failure to "explore" accommodations with respondent in an interactive dialogue itself violates the ADA's reasonable accommodation requirement – the opinion would squarely conflict with the holdings of several other courts of appeals. *See* Pet. Rep. Br. 7.

stances to request the accommodation before her termination. *See* Pet. App. 18a (identifying the question in the case as the "purely legal one" of whether it was respondent's "burden to make an express request for a leave of absence before she was terminated"). The Ninth Circuit rejected MHA's argument that respondent "is not entitled to a leave of absence because she failed to ask for one before she was fired," holding instead that "MHA was under a continuing duty to offer a reasonable accommodation." Pet. App. 22a. On that basis, the court held "as a matter of law" that "MHA violated the ADA's reasonable accommodation requirement." *Id.* The Ninth Circuit's holding that an employer has a "continuing duty to offer a reasonable accommodation," even if the accommodation was already offered and rejected, warrants this Court's review.

The government suggests (Gov. Br. 9) that the question "has an abstract and hypothetical quality" in this case because "[r]espondent takes issue with [its] basic premise – she denies that petitioner offered her a leave of absence which she then rejected." That argument is without merit. The district court found as a matter of fact that respondent "was initially offered a leave of absence and had rejected it." Pet. App. 45a; *see id.* at 27a ("Plaintiff understood . . . that she had the option of taking some time off, but indicated that she did not wish to take time off"); *id.* at 42a. To be sure, the Ninth Circuit, as the government observes, did not specifically affirm that factual finding. But the Ninth Circuit went even further, holding that the "factual dispute" simply was "not material to [its] ruling," Pet. App. 4a, and *explicitly assuming* in its analysis that the district court's finding was correct, *see* Pet. App. 20a ("assum[ing] that Humphrey turned down the leave of absence"). As a result, the court below held that MHA was under a "continuing duty" to offer a leave of absence to respondent *even assuming* that the accommodation had previously been offered and rejected. This case therefore squarely presents the first question presented

in the petition.

2. The government contends (Gov. Br. 13-15) that there is no conflict on that question between the opinion below and *Hankins v. The Gap, Inc.*, 84 F.3d 797 (6th Cir. 1996). That is incorrect. Here, respondent – according to the district court's factual finding and the Ninth Circuit's explicit assumption – had rejected MHA's offer of a leave of absence. In *Hankins*, likewise, the employee had been made "clearly aware" of the availability of "leave time," but had "refus[ed] to accept [the] available reasonable accommodation[]." *Id.* at 801-02. The employee there, like respondent here, asserted that the employer had an obligation to reiterate the availability of leave time before terminating her. *See id.* at 801. But whereas the Ninth Circuit below held that MHA was required to reiterate its offer of a leave of absence before terminating respondent because of an employer's supposed "continuing duty to offer a reasonable accommodation," Pet. App. 21a-22a, the Sixth Circuit in *Hankins* held to the contrary, finding "that an employer has no duty to reiterate self-evident options to an employee when she is clearly already aware of them." *Id.*

The government asserts that the cases are factually distinct, because *Hankins* "dealt with an employee who failed to take advantage of generally available policies." Gov. Br. 15. But in this case, MHA likewise "had a policy of granting leaves to disabled employees," a fact emphasized by the opinions below. Pet. App. 22a; *id.* at 29a. The only difference is that, here, MHA *also* specifically offered a leave of absence to respondent, and respondent specifically rejected that offer.

The government therefore is wrong in suggesting (Gov. Br. 15) that the Sixth Circuit might have decided this case in the same manner as the Ninth Circuit did below. According to the Sixth Circuit, when an employer generally makes leave time available to employees in an employment policy,

the employee is presumed to be "clearly already aware" of the availability of leave time, and it should be "self-evident" to the employee that she can request a leave. 84 F.3d at 801. In those circumstances, the employer has "no duty to reiterate self-evident options to an employee." *Id.* There is no basis for believing that the Sixth Circuit would rule differently where, as here, an employer not only has a general policy of granting leaves of absence, but also specifically offers a leave to an employee – in that situation, the availability of a leave of absence is even more clearly "self-evident," and the employer even more clearly has "no duty to reiterate" the availability of the accommodation prior to termination. For the same reasons, the Ninth Circuit necessarily would decide *Hankins* differently from the Sixth Circuit, based on the "continuing duty to offer a reasonable accommodation" that now governs in the Ninth Circuit. Pet. App. 21a-22a.[2]

3. Finally, the government contends (Gov. Br. 9-12) that the decision below is correct on the merits. That contention should not affect the decision whether to grant certiorari in

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[2] The government suggests (Gov. Br. 13) that the conflict does not involve an issue of recurring importance. But the only reason there have been few cases on the question is that, until the Ninth Circuit's decision below, no one supposed that an employer was required to continually reiterate the availability of an accommodation (for an unspecified number of times) even after an employee has specifically been offered and has rejected the accommodation. Instead, the law generally recognized the common sense assumption that, where an employee has rejected a proposed accommodation, the employee cannot then bring an action alleging that the employer violated the ADA by failing to provide that accommodation. *See Hankins, supra*; Pet. App. 45a (district court concluding below that plaintiff cannot prevail where she "was initially offered a leave of absence and rejected it, and then failed to request a leave of absence subsequently"). The Ninth Circuit's contrary decision below has profound implications for employers, who must now engage in the exercise of attempting to ascertain how many times they must reiterate the availability of a particular accommodation to satisfy their newly-minted "continuing duty to offer a reasonable accommodation." Pet. App. 21a-22a.

view of the conflict between the Ninth and Sixth Circuits and the importance of the issue to employers. But the government's analysis of the merits is incorrect in any event. In the government's view (Gov. Br. 11), an employer cannot be held liable for failing to make a reasonable accommodation that was offered and "categorically" rejected, but an employer can be held liable where the employee's rejection of the accommodation is only "constructive" in the sense that the employee prefers a different accommodation.

Even if there were any basis for such an elusive distinction in the ADA, the government's rationale misses the point. Our argument is not, as the government apparently believes, that an employer is permanently insulated from liability for failing to provide a particular reasonable accommodation if the employee initially rejects the accommodation. Our argument instead is that, once an employee has been made aware of the availability of a particular accommodation and has rejected it – whether "categorically" or "constructively" – the employer is not required continually to remind the employee of the accommodation's availability. Instead, the employee must inform the employer that she wishes to take advantage of the available accommodation. The employee cannot file suit based on the employer's failure to provide the accommodation given that the employee was made aware of its availability, rejected it initially, and failed subsequently to inform the employer that she was interested in taking advantage of its availability. That was the conclusion of the Sixth Circuit in *Hankins*, and it is the only sensible reading of the statute. If it were otherwise, an employer, having already made an accommodation available to an employee, would be required to guess whether it must remind the employee of the accommodation's availability an indefinite number of times or else face the prospect of liability for having failed to provide the accommodation.

## II. THE SECOND QUESTION PRESENTED BY THE PETITION WARRANTS THIS COURT'S REVIEW.

The second question presented by the petition is whether a leave of absence is a reasonable accommodation even without any showing of the length of leave necessary to enable the employee to perform her job or any showing of whether a leave is likely to enable her to perform her job. The government's arguments against granting review of that question are unpersuasive.

1. First, with respect to the Ninth Circuit's holding that a a leave of absence is a reasonable accommodation as a matter of law without requiring any evidence concerning the necessary length of the leave, the government contends that the question is not presented by the facts of this case. According to the government, MHA's "failure to respond to respondent's request to work at home with a specific leave of absence proposal pretermitted any negotiation over what length the leave would be." Govt. Br. 18. That argument misses the point.

As the government acknowledges, Dr. Jacasin's letter – the sole evidence in the record concerning the prospect of a leave of absence – said only that respondent "may" benefit from "some time off." That language was the entire basis for the Ninth Circuit's conclusion that a leave of absence was a reasonable accommodation *as a matter of law*. *See* Pet. 22a ("Accordingly, we hold as a matter of law . . . that MHA violated the ADA's reasonable accommodation requirement"). The Ninth Circuit did not remand for further findings to assess the duration of leave that would have been necessary to enable respondent to return to work. The Ninth Circuit's holding that a leave of absence is a reasonable accommodation as a matter of law – even in the absence of any evidence concerning the length of leave necessary to address the disability – conflicts with decisions of the First, Second, Fifth, Sixth, Seventh, Tenth and Eleventh Circuits,

all of which have held that a leave of absence, in order to be reasonable, must be finite in duration. *See* Pet. 21.

2. The other aspect of the second question raised by the petition concerns the Ninth Circuit's holding that a leave of absence is reasonable as long as it could "plausibly" enable an employee to perform the essential functions of her job. Pet. App. 15a-16a. The government concedes (Gov. Br. 18) that the Ninth Circuit's holding on that issue conflicts directly with the Eleventh Circuit's decision in *Duckett v. Dunlop Tire Corp.*, 120 F.3d 1222 (11th Cir. 1997). But the acknowledged circuit split is not suitable for this Court's review, the government asserts, because the opinion below is at odds with an earlier decision of the Ninth Circuit itself, *Mustafa v. Clark County Sch. Dist.*, 157 F.3d 1169 (1998) (per curiam), and this Court should await resolution of the purported intra-circuit conflict.

Contrary to the government's assertion, *Mustafa* does not conflict with the decision below. Govt. Br. 19. To begin with, in *Mustafa* – unlike in this case – there was no dispute concerning the plaintiff's burden of proof in establishing that a particular accommodation would have been effective, and the court did not select one standard over another. Instead, the statement relied on by the government was strictly in the nature of a perfunctory recitation of general standards as background information.[3] In the opinion below, by contrast, the Ninth Circuit was directly confronted with competing burdens of proof, and the court specifically rejected a standard requiring a showing that a leave of absence would "likely" have enabled performance of the job in favor of a lesser standard only requiring a showing that a leave "could have plausibly" enabled performance of the job. Pet. App. 15a. Because the opinion below specifically addresses and

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[3] Indeed, no subsequent decision of any court relies on *Mustafa*'s statement concerning the burden of proof.

resolves the issue, there can be no question that its considered holding, not the passing discussion in *Mustafa*, is the controlling standard in the Ninth Circuit on whether a leave of absence is a reasonable accommodation.

That is especially so because the accommodation at issue in *Mustafa* was not even a leave of absence, but instead was a reassignment to a different position. *See* 157 F.3d at 1176. *Mustafa*'s generalized statement therefore sheds no light on the specific question of whether a plaintiff attempting to demonstrate that a leave of absence is a resasonable accommodation must establish that a leave "likely would have" enabled her to return to work, or whether she need only establish that a leave "plausibly could have" enabled her to return to work. That issue is controlled by the decision below, not *Mustafa*.

Finally, and perhaps most importantly, *Mustafa* does not involve a claim asserted under the ADA, but instead involves a claim brought under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. While the government suggests that the distinction is immaterial (Gov. Br. 19), the ADA makes clear that the Rehabilitation Act only constitutes a floor of protection for employees. *See* 42 U.S.C. § 12201(a) ("Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under [the Rehabilitation Act] or the regulations issued by Federal agencies pursuant to [the Rehabilitation Act]."). Because the Ninth Circuit can, consistent with the ADA, adopt a standard more favorable to employees than a comparable standard under the Rehabilitation Act, there is no intra-circuit conflict between the ADA standard adopted by the opinion below and the more restrictive Rehabilitation Act standard described in *Mustafa*. The acknowledged circuit conflict between the opinion below and the Eleventh Circuit's decision in *Duckett* therefore warrants this Court's review.

## III. THIS COURT'S REVIEW OF THE QUESTIONS PRESENTED BY THE PETITION WOULD NOT BE PREMATURE.

The government contends (Gov. Br. 19-20) that review is not warranted in this case because it is an interlocutory posture. According to the government, further factual development is necessary "on such matters as whether petitioner initially offered respondent a leave of absence, the necessary duration of respondent's leave, and the likelihood that respondent would have been able to perform the job upon her return." Gov. Br. 20. But the Ninth Circuit's opinion forecloses further factual development on any of those issues, holding that a leave of absence is a reasonable accommodation as a matter of law. That issue is now decided, and the only sense in which the case is in an "interlocutory" posture is that the district court must assess on remand whether respondent is disabled. *See* Pet. App. 10a-13a. This Court has previously granted review of questions concerning the proper interpretation of the ADA's reasonable accommodation standard in precisely analogous circumstances. *See US Airways, Inc. v. Barnett*, No. 00-1250 (certiorari granted on reasonable accommodation question even though there remains an unresolved issue of fact concerning whether plaintiff is disabled under the ADA).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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